Supreme Court, U.S.
FILED
OCT 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-541

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BARCLAYSAMERICAN/CREDIT, INC.,
Petitioner,

VS.

ARTHUR QUILLER, LILLIE MAE QUILLER
and all Other Persons Similarly Situated,
Respondents.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OF COUNSEL:

JAY M. SAWILOWSKY
Counsel of Record
902 Georgia Railroad Bank Building
Augusta, GA 30901
(404) 722-8853

JOHN B. LONG
NIXON, YOW, WALLER & CAPERS
1500 Georgia Railroad Bank Building
Augusta, GA 30910
(404) 722-7541

ATTORNEYS FOR RESPONDENTS

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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QUESTION PRESENTED

Should the Supreme Court exercise its discretionary power to review the *en banc* opinion of the Eleventh Circuit Court of Appeals reversing the District Court's judgment dismissing this case for failure to state a claim when none of the eleven Judges sitting *en banc* was in favor of affirming the District Court's opinion and when the record in this case shows not only that the contract used by BarclaysAmerican affirmatively misrepresented to the Quillers their statutory guarantees, but also the actions taken by BarclaysAmerican were contrary to and inconsistent with the Quillers having a right to cure a default within 30 days after receiving a notice of default as required by the Depository Institutions Deregulation and Monetary Control Act of 1980, § 501(c), 12 USCA § 1735(f)-7(Note), and the consumer protection regulations promulgated thereunder, 12 C.F.R. § 590.4(h)?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Statement of the Case submitted by petitioner (BarclaysAmerican) contains many material omissions and misstatements of fact. The Depository Institutions Deregulation and Monetary Control Act of 1980 (hereinafter referred to as "DIDMCA"), does not govern "disclosure," but is a statute requiring certain contractual guarantees if state law is to be preempted. This is not a truth-in-lending case. The issue is not disclosure; it is the possession by consumers of those benefits mandated by Congress.

In enacting DIDMCA, Congress had aims other than merely allowing mobile home finance companies to charge unlimited time-price differentials or finance charges. In *Quiller v. BarclaysAmerican/Credit, Inc.*, 727 F.2d 1067,

1071 (11th Cir. 1984), the Court indicated that there was a *quid pro quo* for preemption:

> In determining whether the terms and conditions of this agreement comply with the Board's consumer protection regulations, we should keep in mind that Congress included manufactured home financing in its preemption scheme *only on the condition that consumer-debtors would be guaranteed certain safeguards. See* H.Conf.Rep. No. 96-842, 96th Cong.,2d Sess. 79, *reprinted in* 1980 U.S. Code Cong. & Ad.News 298, 309. (Emphasis added.)

The need for the minimum consumer benefits and safeguards set forth in DIDMCA, § 501(c), and the consumer protection regulations, 12 C.F.R. § 590.4 is that, as a class, mobile home buyers are more vulnerable, easier to overawe, less able to understand or defend their rights, easier to intimidate and easier to victimize. (See Petition for Writ of Certiorari in *Grant v. General Electric Credit Corp.*, Case No. 85-584, pp.5-9.) In enacting DIDMCA, Congress intended that certain consumer protection benefits be part of the "terms and conditions" of credit sale contracts by requiring that the "terms and conditions" relating to credit sales comply with the consumer protection provisions specified in regulations promulgated by the Federal Home Loan Bank Board (hereinafter "FHLBB"). Congress mandated a right to cure by providing that the regulations "*shall require a 30-day notice prior to instituting any action leading to repossession or foreclosure (except in case of abandonment or other extreme circumstances).*" DIDMCA, § 501(c)(2). In proposing regulations, the FHLBB twice warned mobile home finance companies that their contracts would be open to attack under state usury laws and would not be eligible for preemption unless the credit sale contract or "loan" "complied with such regulation" and unless the consumer

protections were "included in loans." 45 Fed.Reg. 31
(May 12, 1980) (proposed May 5, 1980), 45 Fed.Reg. 43
(June 30, 1980). In the preamble to the final amendment
the regulations, the FHLBB stated that those regulat
only applied when a creditor covered by the Act *choose*
charge an interest rate which exceeds the state usury l
on mobile home loans. 45 Fed.Reg. 43681, 43682 (June
1980).

On June 27, 1981, the Quillers entered into a retail ins
ment sales contract with Vintage Enterprises, Inc., c
form contract prepared by petitioner, Barclays Amer
(BarclaysAmerican, Appendix M-8-M-11). The cont
was made in the State of Georgia, was to be performed in
State of Georgia, and was subsequently assigned
BarclaysAmerican.[1]

The unpaid balance owed by the Quillers at the time of
contract was $16,000.00. The time-price was $47,417
making the total time-price differential or finance cha
$31,417.40 (BarclaysAmerican, Appendix M-8). In Geor
the maximum time-price differential was limited to a
add-on rate, which, in this case amounts to $24,000.00 (
× 15 years × $16,000 = $24,000). O.C.G.A. § 10-1-3
BarclaysAmerican charged the Quillers $7,417.40 in ex
of that permitted by Georgia law.

By placing the Quiller contract in one hand and DIDM
and the consumer protection regulations in the other,

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[1]In Georgia, the conflicts rule is that the law of the place o
contract governs. O.C.G.A. § 1-3-10; *General Telephone Co. o*
Southeast v. Trimm, 252 Ga. 95, 311 S.E.2d 460 (1984). The con
further provided that if any part of the contract was invalid, une
ceable or inconsistent with the applicable laws or regulations o
state of the seller's address, that such part of the contract wou
deemed amended, modified or deleted to conform thereto.
clays American, Appendix M-10).

can easily determine that the contract not only does not grant as "terms and conditions" those rights that must be granted in order to obtain preemption, but also that the contract contains affirmative misrepresentations as to the consumer's statutory and regulatory guarantees.

The Quiller contract provides in part:

> *Time is of the essence* . . . If Customer defaults on any obligation under this contract, or if *Holder shall consider the indebtedness or Collateral insecure, the full balance may, upon election of Holder, without notice, subject to any notice of right to cure, become due and payable*, less the required rebate of the Finance Charge . . . Customer agrees in any such case to pay said amount or, at Holder's election, to deliver the Collateral to Holder and Holder may, *without notice or demand for performance or legal process*, peaceably enter any premises, but not into any dwelling, where the Collateral may be found, peaceably take possession of it and custody of anything found in it. Upon default, Holder shall have all the remedies of a secured party under the Uniform Commercial Code. (BarclaysAmerican, Appendix I-3; M-10; B-8). (Emphasis added.)

Now, compared with the statute, it is obvious that the "terms and conditions" relating to this credit sale do not "require a 30-day notice prior to instituting any action leading to repossession or foreclosure (except in the case of abandonment or other extreme circumstances)." DIDMCA, § 501(c)(2). It is also clear that this credit sale contract contained "terms and conditions" inconsistent with the requirement that no action to repossess or foreclose, or to accelerate payment of the entire outstanding balance can be taken against the debtor until 30 days after the creditor

sends the debtor a notice of default in the form set forth in the regulation. 12 C.F.R. § 590.4(h). It is also clear that the right to demand the "full balance" is contrary to the regulation that allows only past due payments and late charges to be demanded on the first two defaults in a year.

In September of 1982, the Quillers missed a payment. In its amended answer and counterclaim, BarclaysAmerican admitted *in judicio* that the Quillers were then sent a *20-day notice* to cure default, not the required 30-day notice set forth in 12 C.F.R. § 590.4(h) (see BarclaysAmerican's first amendment to its Answer, Appendix A-2a, 4a). That notice of default further stated that:

(a) The Quillers would only be given one notice of right to cure this default, all contrary to 12 C.F.R. § 590.4(h).

(b) That if there was another default, no additional notice would be sent, all contrary to 12 C.F.R. § 590.4(h).

(c) That the Quillers would be liable for the difference between the value of their home and $44,309.39, that sum being the unpaid total of payments, contrary to 12 C.F.R. § 590.4(c).

Mrs. Quiller promptly cured that default (R-3, pp.34-35).

In December of 1982, the Quillers again missed a payment. In connection with that default, according to uncontradicted testimony and according to the *in judicio* admissions of BarclaysAmerican, no attempt whatsoever was made to give the Quillers any notice of default or any right to cure this default as required by DIDMCA, § 501(c)(2), or 12 C.F.R. § 590.4(h) (BarclaysAmerican Appendix A; R-3, pp.39-40). In connection with that occurrence, BarclaysAmerican merely had the Quillers execute a document

authorizing BarclaysAmerican to take possession of their home (Appendix A-6a-7a). This attempt to obtain the Quillers' trailer precipitated the filing of this action. The Quillers are still in their home.

BarclaysAmerican has inadvertently omitted to mention to this Court that in connection with its defense of this action, it took the position that DIDMCA was unconstitutional and that this contract was governed by the laws of the State of South Carolina (Appendix B).[2]

BarclaysAmerican inadvertently failed to inform this Court that at the time this action was filed, the Superior Court of Richmond County, Georgia granted a temporary restraining order protecting members of this class from repossessions and foreclosures without judicial supervision (Appendix C). The District Court, after an evidentiary hearing and prior to dismissing this case, also granted preliminary injunctive relief providing protection for the members of this class (Appendix D). BarclaysAmerican fails to mention to this Court that as long as the mandate of the Eleventh Circuit is stayed, that it is free to continue to foreclose security interests, repossess homes without notice and collect finance charges in excess of that permitted by Georgia law, all without judicial supervision.

BarclaysAmerican has inadvertently failed to mention the genesis of the "Vartanian" informal opinion (BarclaysAmerican, Petition, pp.5-6; BarclaysAmerican, Appendix J). That unofficial opinion was a letter issued 16 months after the date of the Quiller contract, was not an "interpretation" or rule made pursuant to the Admin-

[2]Even if South Carolina law governed this transaction, BarclaysAmerican charged more than permitted by South Carolina law. The South Carolina law then in effect limited the time-price differential to a finance charge based on 18% simple. § 37-2-201(2)(b) of the South Carolina Code of 1976.

istrative Procedures Act, 5 U.S.C. § 553 or under DIDMCA § 501(f) and was merely an informal opinion solicited by a mobile home finance company in an effort to defeat litigation pending in the State of Arkansas, all without notice to the parties in connection with the Arkansas litigation and without notice to the public. This unofficial opinion was solicited by the law firm of Witkowski, Weiner, McCaffrey and Brodsky of Washington, D.C., the same law firm which filed an *Amicus* brief before the Eleventh Circuit on behalf of the Coordinating Counsel on Manufactured Housing Finance (Appendix E)[3]

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[3]This letter requesting the Vartanian letter was, as well as other internal memoranda of the Office of General Counsel of the FHLBB and other requests from mobile home finance companies obtained pursuant to the Freedom of Information Act subsequent to the initial opinion in *Quiller v. BarclaysAmerican/Credit, Inc.*, 727 F.2d 1067 (11th Cir. 1984). These documents reveal that throughout this and related litigation, certain mobile home finance companies have met, solicited and suggested that certain positions be advanced by the then acting General Counsel of the FHLBB, all *ex parte* without notice to the Quillers or similar plaintiffs in companion litigation. This unilateral method of producing "unofficial opinions" has resulted in the Office of General Counsel receiving only those facts and contentions favorable to the mobile home finance companies. The Quillers were concerned that the Office of General Counsel of the FHLBB might unsuspectingly be utilized in such a manner by certain mobile home finance companies and, thus, requested to be notified if this procedure was used as early as May 11, 1983 (Appendix F). The Office of General Counsel never responded to that request and the Quillers were never notified concerning the meeting of May of 1983 (Appendix G, Note 1; Appendix H, ¶ 1), the request for assistance in August of 1983 (Appendices G and H) and the meetings and request for assistance in March and April of 1984 (Appendices J, K, L and M). The Office of General Counsel of the FHLBB, in connection with this litigation and in connection with companion litigation, has not been an impartial agency issuing interpretations of its regulations, but has been an advocate of certain mobile home finance companies, issuing

The "Vartanian" letter was not an interpretation of the FHLBB and there had been no delegation of authority to the Office of General Counsel to issue interpretations with regard to § 501(f) of DIDMCA (Appendix I). Furthermore, the "Vartanian" letter did not refer to the mandate of Congress contained in § 501(c)(2) of DIDMCA and made no reference to the expressions of regulatory intent by the FHLBB set forth in the *Federal Register* in connection with proposed regulations and in connection with final regulations promulgated. 45 Fed.Reg. 31122 (May 12, 1980); 45 Fed.Reg. 43681 (June 30, 1980); 45 Fed.Reg. 43682 (June 30, 1980).

BarclaysAmerican has inadvertently failed to mention that the *Amicus* briefs filed by the Office of General Counsel of the FHLBB were all the product of lobbying efforts by BarclaysAmerican and other mobile home finance companies, conducted all *ex parte* and without notice to the Quillers (Appendices G, H, J, K, L and M). The method of litigating this controversy chosen by certain finance companies magnifies the importance of our adversarial system of justice.

As can be seen from some of the *ex parte* communications with the Office of General Counsel of the FHLBB, mobile home finance companies have even suggested what arguments should be made by the Office of General Counsel (Appendix M). The documentation that has been produced pursuant to the Freedom of Information Act shows that the Office of General Counsel of the FHLBB quickly responded to mobile home finance companies' requests and during this same period of time, the request made by the Quillers on

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post hoc rationalizations. (The documents reproduced in Appendices E, F, G, H, I, J, K, L and M were included in the Appendices to the *en banc* briefs filed by the Quillers before the Eleventh Circuit.)

May 11, 1983, merely to be advised and to be heard, remained unanswered (Appendix F).

BarclaysAmerican has inadvertently overlooked the fact that according to the Office of General Counsel's second *Amicus* brief, BarclaysAmerican is not entitled to claim that the Quiller transaction is preempted from state law. In connection with that *Amicus* brief, even the Office of General Counsel stated that if, in fact, a court found that the prescribed notice under 12 C.F.R. § 590.4(h) was not provided to the debtor, then the creditor would lose its federal preemption of state usury laws and the debtor would then have available to it the full panoply of rights and remedies under the applicable state usury statutes (BarclaysAmerican Appendix L-16).

REASONS FOR NOT GRANTING THIS WRIT

I. Introduction:

A. BarclaysAmerican Cannot Prevail Under its Own Theory.

The record shows that the conduct of BarclaysAmerican places its contract outside the scope of DIDMCA (Appendix A). Therefore, even if this Court agrees with BarclaysAmerican, it cannot prevail.

BarclaysAmerican has argued that DIDMCA and the consumer protection regulations promulgated thereunder, 12 C.F.R. § 590.4 were only intended to govern "conduct" subsequent to the time of the contract. Such arguments presuppose that Congress intended with the enactment of DIDMCA to preempt all state regulations of time-price differential in connection with the credit sales of trailers or mobile homes. Such a construction requires one to ignore the plain meaning of DIDMCA, § 501(c), which provides that the preemption afforded by that statute does not apply

to a "credit sale" unless the "terms and conditions" relating to such "credit sale" comply with the consumer protection provisions specified in regulations promulgated by the FHLBB. That construction also requires one to ignore DIDMCA, § 501(c)(2), where Congress mandated that those regulations "require a 30-day notice prior to instituting any action leading to repossession or foreclosure (except in case of abandonment or other extreme circumstances)."

It is also clear from the FHLBB comments to proposed regulations that if the credit sale contract did not comply with the regulations, that such a contract would be open to attack under state usury laws and would not be eligible for preemption. 45 Fed.Reg. 31122 (May 12, 1980) (proposed May 5, 1980), 45 Fed.Reg. 43681 (June 30, 1980). BarclaysAmerican also overlooked the preamble to the final regulations which provides that a mobile home lender still had to make a choice of either proceeding under state law or entering into a credit sale under federal law, the FHLBB providing in part:

> Applicability: These regulations apply only when a creditor covered by the Act *chooses* to charge an interest rate which exceeds the state's usury limit on mobile home loans. 45 Fed.Reg. 43681, 43682 (June 30, 1980). (Emphasis added.)

A mobile home finance company has to make a "choice" at the inception of the contract. To adopt BarclaysAmerican's position would be to ignore the law which provides that preemption of state law by a federal statute or regulation is not favored in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion or that Congress had unmistakenly so ordained. *Florida Lime and Avacado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

BarclaysAmerican also failed to point out that even if this Court adopted the post-hoc rationalizations of the General Counsel of the FHLBB set forth in an Amicus Brief filed before the Eleventh Circuit, BarclaysAmerican, based on its own *in judicio* admissions and based on its own conduct subsequent to the date of the contract, lost its preemption. (Appendix A; see, also, BarclaysAmerican's Appendix L-10, where the FHLBB's General Counsel stated in an Amicus Brief:

> . . . if the creditor fails to give the Board prescribed notice upon certain debtor defaults, the usury preemption is lost.)[4]

The undisputed facts in the record, including the admissions *in judicio*, show that in fact BarclaysAmerican's subsequent conduct violated both DIDMCA and the regulations by (a) giving the Quillers a 20-day notice to cure (Appendix A-2a, 4a); (b) providing in the 20-day notice language that the Quillers would not be given any further notice upon further default and that the Quillers would be liable for the difference between the value of the home and the amount falsely claimed to be the unpaid balance (Appendix A-4a); (c) upon the second default within the same year, making immediate demand for the trailer and obtaining a release permitting immediate repossession (Appendix A-6a-7a); (d) in connection with its counterclaim, accelerating and seeking possession of the trailer and judgment for the debt plus attorney's fees without giving the prerequisite notice of right to cure (Appendix A-3a). Furthermore, the "conduct"

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[4]In its initial *Amicus* brief, the Office of General Counsel stated in part, "state usury limits on loans on residential manufactured homes are preempted as long as the loans *are made* in conformance with the Board's consumer protection regulations . . . " (BarclaysAmerican, Appendix K-8). Only after the panel decision favorable to the plaintiffs did General Counsel switch to the "conduct" theory.

argument has not been accepted, either by the majority or by the dissent *en banc* in *Quiller v. BarclaysAmerican/Credit, Inc.*, 764 F.2d 1400 (11th Cir. 1985).

BarclaysAmerican has argued that the dissents in *Quiller v. BarclaysAmerican/Credit, Inc.*, 764 F.2d 1400 (11th Cir. 1985), revealed a sharp and fundamental philosophical split among the Court members. BarclaysAmerican has obviously misread these dissents. Circuit Judge Roney, in dissenting, was of the opinion that the contract was at best ambiguous and that it should not be held invalid on a motion to dismiss. While the dissent addressed the issue of what remedy was available, the District Court has not addressed the issue of "remedy" and until that issue is addressed by the District Court, it is premature.

The Quillers believe that in order for a transaction to be preempted from state law under DIDMCA, that the terms and conditions of the contract must specifically grant to a mobile home purchaser the right to cure a default within 30 days after the sending of a notice of default prior to any action to accelerate, repossess or foreclose. However, this is not the case to decide that issue. Under BarclaysAmerican's own "conduct" theory, this contract is not entitled to preemption.

B. Economic Impact.

The statement made by BarclaysAmerican that the potential *ad damnum* in this case and in similar cases is in the hundreds of millions of dollars, is an allegation that is not supported by the record in this case or in other related cases. While BarclaysAmerican and other mobile home finance companies have made that argument on the one hand, at the same time, they have argued that the potential recovery is substantially limited. While the Quillers believe that they and those similarly situated are entitled to the

damages set forth in the Georgia Motor Vehicle Sales Finance Act (GMVSFA), O.C.G.A. § 10-1-38(b) and O.C.G.A. § 10-1-38(c), the issue of *ad damnum* has not yet been decided by the District Court and is not properly before this Court.

Furthermore, while a motion for class certification was pending at the time this case was dismissed (R-318-319), this case has not yet been certified. Thus, as this case stands, the individual plaintiffs are seeking a bar to the collection of finance charges and if this violation of Georgia law was willful, double the time-price differential. O.C.G.A. § 10-1-38; *Bozeman v. Tifton Federal Savings & Loan Assn.*, 164 Ga.App. 260, 297 S.E.2d 49 (1982). Also, under the contract of adhesion drafted by BarclaysAmerican, at a minimum, the Quillers would be entitled to a contract which limited the finance charges to the maximum permitted by Georgia law, which is some $7,417.40 less than what is being assessed. The Quiller contract, drafted by BarclaysAmerican, provides that if it is inconsistent with state law, the contract would be deemed amended, modified or deleted to conform thereto (BarclaysAmerican, Appendix I-3; M-10).

On the Quillers' side, the argument can be made that every day consumers are being damaged. Every day BarclaysAmerican is collecting monies not permitted by Georgia law and consumers are without the protection mandated by Congress. The delay that BarclaysAmerican now seeks can only benefit one party, that is, BarclaysAmerican. Every day, as long as the mandate of the Eleventh Circuit is stayed, BarclaysAmerican is free to repossess, foreclose and accelerate, all without judicial supervision. As pointed out by the Eleventh Circuit, not every controversy culminates in litigation. Unsophisticated consumers are unnecessarily seeking the protection of bankruptcy or even

worse, voluntarily relinquishing their homes to Barclays-American under threats such as that the axles and wheels are on their way (see extract from the Order of the United States District Court for the Southern District of Georgia on June 9, 1984 granting preliminary relief to the class in *Moyer, et al v. Citicorp, et al*, Case No. CV 183-93, set forth in the Petition for Writ of Certiorari in the case of *Grant v. General Electric Credit Corp.*, Case No. 85-584, p.7-9).

II. The Eleventh Circuit's Decision Is Not Contrary To Any "Interpretation" Of The Federal Home Loan Bank Board.

A. The Eleventh Circuit's Opinion.

Contrary to the assertions made by BarclaysAmerican, the Quillers did not merely allege that the Quiller contract was not entitled to preemptive status because the contract violated 12 C.F.R. § 590.4(h). The Quillers alleged that BarclaysAmerican's contract was governed by the provisions of the GMVSFA and that BarclaysAmerican willfully violated the provisions of the GMVSFA (¶¶ 5 and 7, plaintiffs' complaint; BarclaysAmerican's Appendix M-2, M-3). In connection with BarclaysAmerican's motion to dismiss, the allegations of the complaint must be taken as true and this complaint should not have been dismissed for failure to state a claim unless it appeared beyond doubt that the plaintiffs could prove no set of facts in support of their claim which would entitle them to relief. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1962); *Conley v. Gibson*, 355 U.S. 41 (1957). When this case was dismissed, the District Court had before it BarclaysAmerican's *in judicio* admissions that its conduct was contrary to DIDMCA, § 501(c)(2), and 12 C.F.R. § 590.4(h) (Appendices A, B; R-3, pp.34-51). Furthermore, while there were majority and dissenting opinions of the Eleventh Circuit sitting *en banc*, no opinion was in favor of affirming the District Court's order.

B. The FHLBB has not Issued any Official Interpretation Inconsistent with the Majority Opinion in Quiller.

The Vartanian letter was merely an unofficial opinion by the then General Counsel, solicited at the request of a mobile home finance company in an effort to defeat litigation pending in the State of Arkansas, all without notice to the other parties (Appendix E). There had been no delegation of authority from the FHLBB to the General Counsel to issue any interpretation pursuant to § 501(f) of DIDMCA (Appendix I). Furthermore, the Vartanian letter merely referred to the regulations and not to the statute, which statute showed the intent on the part of Congress that a 30-day notice of default and right to cure prior to any action leading to repossession or foreclosure was a prerequisite to preemption. DIDMCA § 501(c)(2).[5]

BarclaysAmerican has argued that Amici Brief of the FHLBB's General Counsel should be entitled to deference. Deference should not be afforded to *post hoc* rationalizations by the then acting General Counsel or General Counsel of the FHLBB obtained *ex parte* in connection with pending litigation. *Bread Political Action Committee v. FEC*, 455 U.S. 577 (1982) at 582; *Consumer Products Safety Commission v. GTE Sylvania*, 447 U.S. 102 (1980). These unofficial opinions of General Counsel are not the same as official

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[5]Congress was obviously aware that in connection with a substantial number of conventional residential real estate mortgage loans, the documentation used which consisted of a promissory note and mortgage which are on uniform instruments approved by the Federal Home Loan Mortgage Corporation (Freddie Mac) and the Federal National Mortgage Association. These uniform instruments, which are accepted nationally in the secondary mortgage business, contain contractual rights granting the debtor the right to a 30-day notice of default and the right to cure that default within 30 days prior to acceleration or foreclosure (see Appendix N).

interpretations. "Unraveling a New Federal Usury Law," *The Business Lawyer*, Vol. 37, April 8, 1982, p.1079. In the case at hand, the *post hoc* rationalizations are inconsistent with the statute, are inconsistent with the position of the FHLBB at the time comments were sought on the proposed regulations and are inconsistent with the preamble to the final regulations. DIDMCA, § 501(c); 45 Fed.Reg. 31122 (May 12, 1980); 45 Fed.Reg. 43681 (June 30, 1980).

C. This Court's Opinion in Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980), Does Not Require Reversal.

In *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980), this Court dealt with a truth-in-lending situation where Congress, in the Truth-in-Lending Act, had delegated broad administrative lawmaking powers to the Federal Reserve Board when it framed the Act. 15 U.S.C. § 1640. There, Congress conferred special status upon official staff interpretations. 15 U.S.C. § 1640(f). In *Milhollin*, there was a complete absence of an expressed statutory mandate that acceleration clauses be disclosed. In the case at hand, the Act requires, itself, that the "terms and conditions" of the "loan" or "credit sale" comply with the consumer protection provisions. Congress obviously intended that mobile home owners, just as conventional homeowners whose mortgages are evidenced by uniform Freddie Mac and Fannie Mae forms, would be given a specific right to a notice of default and a specific right to cure such a default within a 30-day period prior to repossession or foreclosure. DIDMCA § 501(c)(2)(Appendix N). If this Court were to adopt the position advanced by BarclaysAmerican, then this Court would abdicate its judicial responsibility to interpret the plain meaning of this statute and these regulations to the then acting General Counsel of the FHLBB. *Securities Industries Assn. v. Board of Governors of the*

Federal Reserve System, 468 U.S. ____, 82 L.Ed.2d 107 (1984). Surely, this Court did not intend for *Milhollin* to be used to sanction parties in litigation attempting to defeat pending litigation by obtaining *post hoc* rationalizations from a government employee, all *ex parte*. (Obviously, if finance companies had been unsuccessful in their *ex parte* efforts, these unofficial opinions would never have been known to the Quillers or to similar mobile home purchasers.)

Furthermore, *Milhollin* does not stand for the proposition that an agency's construction of a *contract* is entitled to great weight. In this case, the Office of General Counsel of the FHLBB is attempting to construe the Quiller contract. Courts construe contracts.

The body of American law, by general rule, is that the right to repossess is absolute once default has occurred and the secured party may immediately repossess without notice—unless *otherwise provided in the contract*. If there is no provision in the contract requiring the creditor to give notice prior to repossession, there is no such right to notice prior to repossession. Uniform Commercial Code, § 9-503. Georgia follows that same general rule in the construction of its adoption of the Uniform Commercial Code. O.C.G.A. § 11-9-503; *Ford Motor Credit Co. v. Hunt*, 241 Ga. 342, 245 S.E.2d 295 (1978). In that case, the Georgia Supreme Court held that the consumer had no cause of action for wrongful repossession without notice because the consumer had no contractual right to notice. The Quiller contract contains language almost identical to that in *Hunt*. Barclays-American has argued that the invalid portions of its contract of adhesion should simply be invalidated and that consumers can adequately be protected from actual violations of DIDMCA when and if they occur by a counterclaim for wrongful repossession (BarclaysAmerican, Petition for Certiorari, p.25).

BarclaysAmerican correctly noted that Georgia courts have allowed recovery in tort for wrongful repossession. However, one of the cases cited is particularly inappropriate, that being *Ford Motor Credit Co. v. Hunt*, 141 Ga.App. 612, 234 S.E.2d 112 (1977). Inadvertently, BarclaysAmerican overlooked the fact that *Ford Motor Credit Co. v. Hunt*, 141 Ga.App. 612, 234 S.E.2d 112 (1977), was specifically reversed by the Georgia Supreme Court in *Ford Motor Credit Co. v. Hunt*, 241 Ga. 342, 245 S.E.2d 295 (1978). (See the intermediate decision of the Georgia Court of Appeals, after the initial remand, at 144 Ga. App. 281, 241 S.E.2d 9 (1977).) In reversing the Georgia Court of Appeals, the Georgia Supreme Court specifically held that the plaintiff had no cause of action for wrongful repossession. In that case, the repossession was done without any prior notice of the repossession or of the intent to accelerate the entire balance of the debt. The Georgia Supreme Court held that the creditor had the right to accelerate without notice and to repossess without notice because there was no requirement *in the contract* that notice be given prior to repossession or acceleration.

BarclaysAmerican more appropriately should have cited its own case of *Roach v. BarclaysAmerican/Credit, Inc.*, 164 Ga.App. 616, 298 S.E.2d 304 (1982). In that case, BarclaysAmerican not only repossessed the automobile, but also abducted the owner. The Georgia Court of Appeals agreed with BarclaysAmerican that it had, on default, the right to take possession of its collateral without judicial process if that could be done without breach of the peace, but held that summary judgment in favor of BarclaysAmerican was inappropriate since BarclaysAmerican not only repossessed the property but the owner as well. In light of BarclaysAmerican's conduct toward Mrs. Roach and the Quillers, it is obvious that the consumer benefits man-

dated by Congress must be set forth in the contract if they are to be meaningful.

III. The *En Banc* Opinion In *Quiller* Is Not In Conflict With The Clear Language Of DIDMCA and 12 C.F.R. § 590.4(h).

A. DIDMCA is Not a Disclosure Statute.

In enacting DIDMCA, Congress referred to the "terms and conditions" of the credit sale. DIDMCA § 501(c)(2). This is not a disclosure statute but is a statute governing the substantive contractual rights of the parties. In the preamble to the final regulations promulgated by the FHLBB, it was specifically pointed out that a mobile home financier could continue to finance trailers under state law, in which case the time-price differential would be limited, but no consumer benefits mandated by Congress would have to be granted, or could instead choose the right to charge unlimited finance charges and fall within the ambit of the federal scheme. If this statute were merely a "conduct" statute as argued by BarclaysAmerican, then BarclaysAmerican would not have to make the election as to whether or not it fell within the federal scheme or the state scheme until its conduct was challenged. That position is contrary to the provisions of the preamble to the final regulations which requires that a "choice" be made. 45 Fed.Reg. 43682 (June 30, 1980).

B. The Contract Provisions of BarclaysAmerican's Contract are in Contradiction to DIDMCA and the Consumer Protection Regulations Promulgated Thereunder.

Circuit Judge Roney, in writing the main dissent, did not adopt the position that a contract can be a federal preemption contract and at the same time claim an unqualified right to accelerate, repossess or foreclose "without notice." Judge Roney wrote:

> It would be inconsistent with federal law for a preemption contract to claim an unqualified right to acceleration, repossession or foreclosure without notice. (764 F.2d at 1401.)

In this case, this Court has before it not merely the naked contract but also the creditor's own actions in enforcing and interpreting its contract. How did BarclaysAmerican construe its own language of adhesion? Not only did the Quiller contract contain inaccurate statements of the creditor's rights under federal law and authorized the creditor to do acts prohibited by DIDMCA, but the actual *conduct* of BarclaysAmerican was contrary to the federal law upon which it now relies (Appendices A, B, D; R-3, pp.34-51).

On page 23 of its Petition for Writ of Certiorari, BarclaysAmerican makes the statement that in the instant case there had been alleged in the complaint no effort on the part of BarclaysAmerican to enforce the provisions of the contract which allegedly violated § 590.4(h). That statement implies facts at odds with BarclaysAmerican's own *in judicio* admissions (Appendix A).

C. This Court Should not Adopt the Second Division of Judge Roney's Dissent in *Quiller 2*.

BarclaysAmerican seeks to use this petition for writ of certiorari to obtain an advisory opinion from this Court as to what damages are available to the Quillers, contrary to provisions of Article 3, Section 1 of the United States Constitution. At this stage, the District Court has not yet assessed damages against BarclaysAmerican and that issue has not yet been presented to the District Court.

IV. The *Quiller* Decision Does Not Affect All Mobile Home Sales And There Is No Evidence To Support Claims Of Billions Of Dollars Worth Of Damages.

A. The Quiller Opinion Does Not Change the Rules of Contractual Construction.

According to the dissent, the language chosen by BarclaysAmerican is ambiguous. Ambiguous contracts are

construed against the drafters. This was a contract of adhesion in which BarclaysAmerican sought not to pay the price for federal preemption, *i.e.*, the granting of certain consumer protections.

The argument is made that immediacy is the essence of acceleration. There is no right to acceleration unless so provided for in the contract. Exactly when a contract is in default is also a matter that has to be set forth in the contract. *Borochoff Properties, Inc. v. Howard Lumber Co.*, 115 Ga.App. 691, 155 S.E.2d 651 (1967); *Trust Company Bank v. Johnson*, 143 Ga.App. 650., 239 S.E.2d 542 (1977). Acceleration clauses can easily be written, such as those in FNMA/FHLMC uniform instruments, all of which contain a 30-day grace period (Appendix N). The arguments that the collateral is a mobile home or trailer ignores the realities of trailer living.[6]

As correctly pointed out by the Eleventh Circuit, most disputes involving mobile home purchasers and finance companies do not culminate in litigation. BarclaysAmerican would have this Court believe that its conduct is always exemplary and that its conduct is consistent with the mandates of Congress and the FHLBB, factors which, according to BarclaysAmerican's own *in judicio* admissions are not correct (Appendix A).

---

[6]Trailers are sold *sans* axles, wheels and tongues used to transport them. Doublewide trailers come in two halves which are attached together at the homesite. These cannot be made readily mobile. Most trailers have skirts and trailers are generally connected to an electrical source, a septic tank and a well. The reason that mobile home finance companies do not wish to specify the 30-day right that is the price for preemption is that threats of foreclosure and threats that the axles and wheels are on their way, place the finance companies in a better position to pressure mobile home purchasers on a day-to-day basis.

B. The Potential Detrimental Consequences to Either Lenders or Consumers are Not Relevant to the Issues Presented Here.

Not all mobile home lenders will be affected by the Eleventh Circuit's opinion. A substantial number of lenders have paid the price for preemption by granting consumers the specific rights set forth in DIDMCA, § 501(c)(2), and the consumer protection regulations promulgated thereunder, 12 C.F.R. § 590.4.

In this case, BarclaysAmerican has not paid the price for preemption and has sought to reserve all rights and remedies that it would have under Georgia law. The *quid pro quo* for preemption has not been paid, yet BarclaysAmerican seeks to collect from the Quillers $7,417.40 more than Georgia law allows.

It is presumed that most mobile home finance companies obey the law and draft their contracts to grant the consumer benefits specifically mandated by Congress and the FHLBB in order to obtain preemption. Furthermore, certain states had no restrictions whatsoever on what could or could not be charged in connection with credit sales of mobile homes and certain states have different provisions than Georgia in dealing with what damages are available if their state regulatory scheme is violated.

The argument is made that creditors simply have not planned for and are not prepared for the consequences of the *Quiller* decision. There is no evidence in this record to support such statements. If, in fact, BarclaysAmerican has willfully and intentionally violated the GMVSFA, then it is not up to this Court to grant BarclaysAmerican a pardon. Similar arguments as to the damages that do flow to consumers who have their trailers pulled in the middle of the night, who lose their possessions and household contents,

who are forced into bankruptcy proceedings, etc., could be made. After all, those alleged billion of dollars of finance charges came out of the pockets of the mobile home buying public. However, the issue of damages is not before this Court and the appropriateness of the remedy available to the Quillers is a subject that is addressed by state law if, in fact, state law has not been preempted.

CONCLUSION

This Court should not grant BarclaysAmerican's Petition for Writ of Certiorari. According to BarclaysAmerican's own *in judicio* admissions, the Quiller contract is not entitled to preemption. The Eleventh Circuit is correct in holding that the contract authorizes conduct inconsistent with DIDMCA and the consumer protection regulations, contrary to BarclaysAmerican's hypertechnical argument.

Respectfully submitted,

JAY M. SAWILOWSKY
902 Georgia Railroad Bank Bldg.
Augusta, GA 30901
(404) 722-8853

JOHN B. LONG

Of Counsel:
NIXON, YOW, WALLER & CAPERS
1500 Georgia Railroad Bank Bldg.
Augusta, GA 3091
(404) 722-7541

APPENDIX

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

ARTHUR QUILLER, LILLIE MAE QUILLER, and all other persons similarly situated,

Plaintiff,

v.

BARCLAYSAMERICAN/CREDIT, INC.,

Defendant.

Civil Action File No. 183-87

DEFENDANT'S AMENDMENT TO ANSWER

COMES NOW the defendant in the above-styled action [hereinafter sometimes referred to as "BarclaysAmerican"], and hereby amends its Answer by amending the title of said pleadings: "Answer and CounterClaim" and, further, by adding the following after the *ad damnum* clause:

COUNTERCLAIM

1.

On or about June 27, 1981, plaintiffs entered into a Retail Instalment Contract with Vintage Enterprises, Inc. in connection with a purchase of a mobile home, as is admitted in paragraph 4 of Plaintiff's Complaint. A copy of said contract is attached to plaintiffs' complaint as Exhibit "A".

2.

Said Retail Instalment Contract was subsequently assigned to defendant as is admitted in paragraph 6 of Plaintiff's Complaint.

3.

Plaintiffs are in default under said Retail Instalment Contract, as admitted on Exhibit "C" hereto.

4.

On or about September 3, 1982, defendant sent to plaintiffs a Notice of Right to Cure, a copy of which is attached hereto as Exhibit "B", which Notice was received by plaintiffs as demonstrated by the Return Receipt shown in Exhibit "B".

5.

In said Notice of Right to Cure BarclaysAmerican made demand on plaintiffs informing plaintiffs that if payment was not received by September 23, 1982 BarclaysAmerican would exercise all of its rights under the contract including the right to repossess any property held as collateral for the transaction and the right to hold plaintiffs personally responsible for any differences between the amount the property brings at the sale and the balance due on the credit transaction.

6.

In addition, plaintiffs are hereby notified that the Retail Instalment Contract contains a provision for payment of attorney's fees in the event defendant is required to enforce the provisions in said Retail Instalment Contract by an action at law or in equity. Said attorney's fees provision will be enforced unless plaintiffs pay the full amount due and owing within ten (10) days of their receipt of this counterclaim. Upon information and belief, defendant did not receive the said sums within 10 days of plaintiffs' receipt of this notice.

7.

On or about December 28, 1982, plaintiffs executed the document attached hereto as Exhibit "C", by which plaintiffs voluntarily acknowledged their default under the retail contract and relinquished their right to possession of the subject mobile home.

8.

Plaintiffs have acted in bad faith, have been subbornly [sic] litigious, and have caused defendant unnecessary trouble and expense in the bringing of this lawsuit especially after plaintiffs specifically acknowledged their default and relinquished possession of the mobile home as shown by Exhibit "C".

WHEREFORE, BarclaysAmerican respectfully prays that judgment be entered in its favor awarding it possession of the subject mobile home and for all sums legally under the Retail Instalment Contract due, including interest, plus all costs incurred in the bringing of this counterclaim and any and all costs incurred in the defense of this lawsuit including, reasonable attorney's fees as provided for in the Retail Instalment Contract and any other relief that the Court may deem just and proper.

Respectfully submitted,

MITCHELL, LOGGINS,
CAMPBELL & ELSBERRY

/s/ Douglas N. Campbell
Douglas N. Campbell

/s/ Elise M. Bloom
Elise M. Bloom

Suite 950, The Equitable Building
100 Peachtree Street
Atlanta, Georgia 30303
(404) 658-140

HARRISON, JOLLES & CRAIG, APC

/s/ Daniel J. Craig
Daniel J. Craig

525 Ellis Street
Augusta, Georgia 30901

EXHIBIT B

Barclays American/Credit, Inc.

Branch Office: 2621A Washington Road., Augusta, GA 30903

Branch Office Phone No.: (404) 737-4642

Your Account No. 37789333

Date of Your Contract/Loan 6/27/81 19___

Present Balance as of 8/3/82 19___ IS $ 44309.39

Arthur and Lillie Quiller
Route 3 Box 476
North Augusta, S.C. 29841

NOTICE OF RIGHT TO CURE

September 23, 1982 Is the LAST DAY FOR PAYMENT
(Date)

$ 268.43 Is the AMOUNT NOW DUE
(Amount)

You are late in making your payment(s). If you pay the AMOUNT NOW DUE (above), by the LAST DAY FOR PAYMENT (above), you may continue with the contract as though you were not late. If you do not pay by the date, we may exercise our rights under the law. These rights include the right to repossess any property held as collateral for this transaction and the right, in may instances, to hold you personally responsible for any differences between the amount the property brings in a sale and the balance due us on the credit transaction in question. If you are late again in making you payments, we may exercise our rights without sending you another notice like this one. If you have questions, write or telephone us promptly. Thanks for your cooperation.

/s/ Rick Murphy
Manager

FORM NO. 8504(S.C.)
Replaces 810

PREPARE IN DUPLICATE. INSERT IN WINDOW ENVELOPE. MAIL CERTIFIED-RETURN RECEIPT REQUESTED. RETAIN COPY & RECEIPT IN FILE.

EXHIBIT C

RELEASE

YEAR	MAKE	IDENTIFICATION NUMBER
1981 Liberty	56 × 24	2L1862XV

ACCOUNT NO.	DEALER NAME (IF APPLICABLE)
37789333	

TO: BarclaysAmerican/Credit, Inc. Party:
FINANCIAL INSTITUTION

I (We) are in default of the terms of the security instrument (hereinafter called Security Agreement) held by you covering the above collateral and, therefore, voluntarily surrender and release the above collateral to you for disposition in accordance with your remedies under the Security Agreement and applicable law. I have been informed that you are declaring all remaining installments, less any required rebate specified in my (our) contract or note, due and payable.

You are authorized and directed on my (our) behalf to cancel any insurance covering the collateral and apply any refund of premiums to the account.

I (We) acknowledge notification and hereby agree that the collateral will be disposed of in accordance with Georgia law and that any Notice of Sale, or other notice required by law, should be sent to me at my address as stated in the Retail Installment contract, or if at a different address, then at the address listed below.

I acknowledge that I have been furnished with a copy of this instrument, and that all personal contents have been removed from the collateral by the undersigned, and that

there is nothing therein to which I (we) will make or claim against BarclaysAmerican/Credit, Inc.

	X/s/ Lillie Mae Quiller
	Customer (Signature)
/s/ Daniel W.	Rt. 3 Box 474
Witness Dec. 28, 1982	Number, Street, City
	N.Augusta, Ga
	State, Zip
	/s/ Arthur Quiller
	Co-Signer or Co-Purchaser
	Rt. 3 Box 474
Witness	Number, Street, City
	N. Augusta, Ga
	State, Zip

Instructions: Complete all blanks. Retain the signed original in customer file and deliver a signed copy to customer and co-signer.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

ARTHUR QUILLER, LILLIE MAE QUILLER,
and all other persons similarly situated,

Plaintiffs

v.

BARCLAYSAMERICAN/CREDIT, INC.,

Defendant

CIVIL ACTION FILE NO. 183-87

AMENDMENT TO ANSWER

COMES NOW the defendant in the above-styled action and, pursuant to Rule 15 of the Federal Rules of Civil Procedure, hereby amends its Answer as a matter of right to include the following:

EIGHTH DEFENSE

Plaintiffs' claims are barred by the doctrine of Release.

NINTH DEFENSE

The law of South Carolina controls the validity of the mobile home purchase and the other matters referred to in plaintiffs' complaint.

TENTH DEFENSE

The provisions of Public Law 96-221, Title V, Sec. 501, March 31, 1980, 94 STAT 161 referred to in plaintiff's complaint are unconstitutional.

Respectfully submitted,

MITCHELL, LOGGINS,
CAMPBELL & ELSBERRY

/s/ Douglas N. Campbell
Douglas N. Campbell

/s/ Elise M. Bloom
Elise M. Bloom

Suite 950, The Equitable Building
100 Peachtree Street
Atlanta, Georgia 30303
(404) 658-140

APPENDIX C

IN THE
SUPERIOR COURT OF RICHMOND COUNTY
STATE OF GEORGIA

ARTHUR QUILLER, LILLIE MAE QUILLER,
And All Other Persons Similarly Situated,

Plaintiffs,

VS.

BARCLAYSAMERICAN/CREDIT, INC.,

Defendant.

CIVIL ACTION FILE NO. 9195-C

RULE NISI

The attached verified Complaint having been read and considered, let the same be filed.

Defendant is hereby ordered to show cause before the Honorable Albert M. Pickett, Judge of the Superior Court of the Augusta Judicial Circuit, on the 3rd Floor of the Augusta-Richmond County Municipal Building, Augusta, Georgia, on the 21st day of March, 1983, at 11:00 o'clock A.M., why Defendant should not be temporarily restrained and preliminarily enjoined from collecting monthly payments from any potential members of this class on any contracts that are tainted as alleged by the Plaintiffs, why the named Plaintiffs and the other members of this class should not be allowed to make their payments pending the final resolution of this case into the registry of this Court, and why the Defendant should not be preliminarily enjoined from proceeding to non-judicially foreclose any mobile home or manufactured home from the members of Plaintiffs' class without prior judicial supervision of said foreclosures. At said hearing, Defendant is hereby ordered to

produce financial information so as to assure this Court that if this action is certified as a class action and if the Plaintiffs are entitled to the relief to which they are demanding that the Defendant would be able to refund any payments currently being made to the Defendant by the members of this class.

Pending said hearing, the Defendant is temporarily restrained and enjoined with proceeding to repossess or foreclose any mobile home from any individual who falls within the definition of Plaintiffs' class without prior approval of this Court.

This *22nd* day of February, 1983.

/s/ Franklin H. Pierce
Judge, Superior Court
Augusta Judicial Circuit

Presented by;

Jay M. Sawilowsky
Attorney for Plaintiffs

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

ARTHUR QUILLER, LILLIE MAE QUILLER,
and all other persons similarly situated,

Plaintiff,

v.

BARCLAYSAMERICAN/CREDIT, INC.,

Defendant.

CIVIL ACTION FILE NO. 183-87

ORDER

Plaintiffs' Motion for Preliminary Injunction having come on regularly for hearing before the Court without a jury, and the Court having considered the evidence presented by both sides and the argument of counsel for all parties, it is hereby

ORDERED that as to all current customers of Defendant who are parties to retail instalment contracts held by Defendant pursuant to which new mobile homes were purchased from the effective date of the regulations promulgated by the Federal Home Loan Bank Board pursuant to the Federal Preemption Statute, referred to by Plaintiffs in their Complaint, through February 23, 1983, and to which purchase, were it not for the existence of said Federal Preemption Statute, the Georgia Motor Vehicle Sales Finance Act would otherwise have applied [said individuals being hereinafter referred to as the "Group"], Defendant will give the thirty (30)-day notice as required by 12 CFR § 590.4(h) at least thirty (30) days prior to Defendant taking any action to repossess or foreclose upon any

mobile home secured by any such retail instalment contract to which any member of the Group is a party; and it is further

ORDERED that as to any such mobile home of a member of the Group which Defendant, after sending such notice and prior to the customer's cure of default, Defendant decides actually to foreclose or which Defendant decides actually to repossess, Defendant will send a copy of such previously sent notice and a copy of the loan contract/security agreement to Plaintiffs' counsel [hereinafter "Mr. Long"], John B. Long, at 1500 Georgia Railroad Bank Building, Augusta, GA 30910, prior to actual foreclosure or repossession. Mr. Long will then actually notify Defendant's counsel, Douglas N. Campbell or Elise M. Bloom, 950 The Equitable Building, 100 Peachtree St., Atlanta, GA 30303 (telephone number 404-658-1400), by mail or telephone so that such notice is actually received by said Defendant's counsel not more than ten (10) days after the postmarked date of the copy of the notice sent to Mr. Long, of any objection to such repossession or foreclosure. If objection is made and no agreement can be reached, Mr. Long will apply to the Court in writing to restrain such foreclosure or repossession not more than fifteen (15) days after the postmarked date of said notice to Mr. Long. Defendant is not restrained from any repossession or foreclosure by this Order.

In the event of abandonment or other extreme circumstances, the Defendant will actually notify Mr. Long by letter received by Mr. Long or by telephone of its intent to repossess or foreclose and if Mr. Long objects, he will actually so notify the aforesaid Defendant's counsel by telephone or in writing actually received by Defendant's counsel, and if no agreement can be reached, file a written application to the Court to restrain said foreclosure or repossession, both not more than two (2) business days after his receipt of Defendant's notice to him.

Mr. Long will under no circumstances contact any member of the class except the Quillers for any reason without the express prior written consent of the Court.

Any documents or information which come into the possession of counsel for Plaintiffs pursuant to this Order will be

treated as absolutely confidential and will never be used by them or the Quillers in any subsequent litigation without the express prior written consent of the Court.

This *11th* day of May, 1983.

/s/ Dudley J. Bowen, Jr.
Judge, United States District Court,
Southern District of Georgia

APPENDIX E

WITKOWSKI, WEINER, McCAFFREY and BRODSKY, P.C.

October 7, 1982

Thomas P. Vartanian, Esq.
General Counsel
Federal Home Loan Bank Board
1700 G Street, N.W.
Washington, D.C. 20552

Re: Manufactured Housing Consumer Protection Provisions —Repossession Notice (§ 590.4(h))

Dear Mr. Vartanian:

We are writing on behalf of the General Electric Credit Corporation ("GECC") to request that the Federal Home Loan Bank Board (the "FHLBB" or "Bank Board") address itself to an issue which has arisen in litigation and which is described in the paragraphs below. We further request that the Bank Board publish its response in a formal interpretation pursuant to 12 C.F.R. § 590.5 under the authority vested in it by § 501 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA" or "the Act").

Statement of Facts — The litigation arose in the state of Arkansas out of the following facts and circumstances. The defendants in the case, on or about May 14, 1981, purchased a mobile home under a retail installment sales contract that was assigned to the plaintiff, our client. The credit sale was secured by the mobile home itself, and the rate upon which the finance charge was calculated under the contract was 17.8 percent, a rate in excess of that permitted under Arkansas state law. However, the plaintiff had carefully structured the transaction to comply with the Bank Board's consumer protection regulations regarding manufactured home loans and credit sales. (12 C.F.R. § 590.4). Under DIDMCA such compliance is a prerequisite for the exemption of these credit transactions from state usury laws (§ 501(a)).

The defendants defaulted in payment under the contract, leaving a substantial unpaid balance outstanding. Upon default, plaintiff gave written notice 30 days prior to acceleration of the debt and repossession. This notice was given on the form and in the manner prescribed by 12 C.F.R. § 590.4(h)(2). Reference to this notice requirement was initially made in the contract in the following manner:

> In the event of Buyer's default in payment when due, Seller may declare immediately due and payable any and all installments due or to become due hereunder, less the unearned portion of the *FINANCE CHARGE* calculated by the Actuarial Method, provided that Buyer shall be given notice of right to cure default before Seller is permitted to exercise that right.

At the ensuing possessory hearing, defendant contended that the contract was usurious under Arkansas law and, therefore, unenforceable. GECC contended that the requirements of the federal preemption of state usury laws for mobile home credit sales under § 501 of DIDMCA had been met and, therefore, the contract was enforceable.

Lest the Bank Board hesitate to issue an interpretation that may influence the course of litigation on the grounds that material facts are in dispute, it should be understood that the material facts of this case were stipulated to by the parties at the hearing. There is no dispute that (1) the contract did not expressly disclose all of the facets of the borrower's right to a 30-day notice, and (2) that the 30-day notice was actually given prior to repossession. The only issue to be decided was whether GECC was required to expressly include as a term of the contract the right of the borrower to a 30-day notice in order to take advantage of the federal rate preemption under DIDMCA.

Despite the fact that the 30-day notice had been given as prescribed, the presiding judge made a preliminary finding that a loan or mobile home credit sale does not qualify

for federal preemption without an explicit contractual disclosure to the consumer of a 30-day notice of his or her right to cure default. Because the contract in this case did not explicitly detail all of the consumer's rights upon default, including the 30 day right to cure, the judge ruled that this credit sale did not qualify for the preemption of the state usury ceiling under § 501 of DIDMCA and 12 C.F.R. § 590.4(h).

Issue — Our question to the Bank Board flows from this ruling. Must a 30-day notice of default and right to cure default be a term of a consumer's credit contract for the purchase of a manufactured home in order for the transaction to qualify for federal preemption pursuant to § 501 of DIDMCA?

ARGUMENT

Introduction — It is our belief that this question should be answered in the negative. We respectfully submit that there is nothing in the Conference Report to § 501 of the Act, the Act itself, the Bank Board's regulations or subsequent interpretations thereof that would require that "notice" of the 30-day cure requirement be contained in the credit contract. We assert, rather, that the 30-day notice provision applies only when default occurs and that any interpretation to the contrary — in the absence of an express legislative or regulatory directive requiring its inclusion — jeopardizes the enforceability of thousands of existing contracts and undermines the safety and soundness of the manufactured housing finance industry.

We also submit that the consumer in this case (as well as any similarly situated individual) neither suffered any harm nor was deprived of any benefit by not having the 30-day notice provision reflected in the credit contract. The consumer did in fact receive a notice of the right to cure. The notice was given in a timely manner on the exact form prescribed by § 590.4(h)(2). All other consumer protections required by the Bank Board were provided. Under

these circumstances, the consumer would have had no greater rights or benefits had he received notice of the 30-day right to cure in the credit contract.

Text of § 501 — The text of § 501 states that the exemption from state usury laws for credit transactions secured by a first lien on a manufactured home will not apply "unless the terms and conditions relating to such loan, mortgage, credit sale, or advance comply with consumer protection provisions specified in regulations prescribed by the Federal Home Loan Bank Board" (§ 501(4)(c)). That section further states that the Bank Board's regulations must include three enumerated provisions, among them, a "30-day notice prior to instituting any action leading to repossession or foreclosure (*except in the case of abandonment or other extreme circumstances*)." (Emphasis added.)

There is nothing in this statutory language which implies an affirmative requirement to have the 30-day notice reflected in the credit contract. On the contrary, the notice requirement exception applicable to abandonment and other extreme circumstances presumes that the notice is to be given exclusively at the time of default and not at the beginning of the legal relationship between the parties[1]. If Congress had intended that notice of the 30-

[1]The result enunciated in the judge's preliminary conclusion may have been premised in part on the notion that a "loan" is either usurious or in compliance at the time of consummation. However, the concept of "loan" involves the entire transaction, from application through collection, and is not merely limited to the execution of a contract. A loan can be usurious, even though the "contract" is entirely legal. For example, assume that a precomputed interest loan is consummated at the maximum rate allowed under state law. Upon prepayment in full before maturity, state law requires that a rebate of any unearned finance charges calculated under the actuarial method is required. If unearned finance charges were rebated under the "Rule of 78's" method rather than under the actuarial method, usurious interest would be collected. Such a transaction would be usurious (1) even if the contract was silent as to the rebate method, and (2) even if the contract called for the use of an actuarial rebate. On the other hand, if an actuarial rebate is actually per-

day right was to be given in the credit contract as well as at the time of default, it would be senseless to provide an exception for "abandonment" or "extreme circumstances," because such events could not be foreseen at the time of the signing of the contract.

The statutory language clearly indicates that before a creditor's duty to give the notice arises, default must occur. No duty would arise unless and until default occurred. However, even this duty would be excused if abandonment or other extreme circumstances occurred. Because abandonment and extreme circumstances cannot be predicted at consummation, the disclosure can only take place at a later period in time.

In the contested transactions, the notice required by § 590.4(h) was provided in connection with the "loan," even though the "contract" did not expressly disclose the 30-day period. Clearly, the "loan" did "contain" the required consumer safeguards. (*See* 12 C.F.R. § 590.3(a)(2)(iii).

Conference Report — In the Manufactured Home Financing section of the Joint Explanatory Statement of the Committee of Conference (H.R. Rep. No. 96-842, at 79 (1980)), the conferees made no mention whatsoever of the 30-day notice requirement. The Conference Report accompanying the Act provides that the consumer safeguards should not preempt similar state laws that are more protective of the consumer. With regard to the contested case, the state of Arkansas has no statutory requirement directing a creditor to give any type of notice upon default on a loan and thus federal law exclusively applies.

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formed, the transaction would not be usurious, even though the contract was silent as to the rebate method. Clearly, subsequent events affect usury determinations, the terms — or lack of terms — in the contract notwithstanding.

Bank Board Regulations — The FHLBB's consumer protection regulations for federally related loans, mortgages, credit sales and advances secured by first liens on residential manufactured homes are set forth in 12 C.F.R. § 590.4. The 30-day notice provision contained therein expands considerably the requirement stated in § 501 of the Act. In addition to a mere notice prior to commencement of repossession, the regulation prescribes a standard form for the notice which includes, most notably, a provision giving the consumer a right to cure the default within 30 days (12 C.F.R. § 590.4(h)).

The regulation states that such notice must be given prior to an exercise of the creditor's rights upon the consumer's default. There is nothing in § 590.4(h) (or the regulatory preambles to the Bank Board's rule and its subsequent amendments) that would lead one to believe that disclosure of the notice requirement in the credit contract is either presumed, anticipated, intended, or required. We note, moreover, that the statutory exemption from the notice requirement for "abandonment" or "extreme circumstances" is reflected in the regulation. The inferences that flow from the statutory exception apply equally here. The fact that the entire provision is prefaced with the exception — "Except in the case of abandonment or other extreme circumstances . . ." — indicates that no affirmative notice or disclosure duties are placed on the creditor if the exception applies.

Section 590.4(h) also provides an additional exception that cannot be foreseen at the time of the signing of the credit contract. It provides: "The debtor is not entitled to notice of default more than twice in any one-year period." As in the case of abandonment or other extreme circumstances, it appears that because the circumstance of three defaults in a one-year period is not :forseeable [sic], any contractual reference to the debtor's right to notice could not have been intended by the Bank Board.

If the specific requirement of the 30-day notice as set forth in § 590.4(h) is determined to be required in the credit contract, compliance with such an interpretation would mandate that a clause similar to the following be part of every manufactured housing credit contract that relies on the § 501 preemption. Such a clause would be so fraught with conditions and exceptions in order to adequately state the scope of the right as to make it vague and confusing to the consumer. At a minimum, it would have to include the following information:

If the Buyer defaults in any of the terms of this contract giving rise to acceleration and repossession, the Buyer shall be given 30-days notice of the right to cure the default before Seller is permitted to exercise his right to accelerate this obligation and foreclose on the secured property; provided, however, that in the case of abandonment of the manufactured home or other extreme circumstance, or in the event that the Buyer has already defaulted on two prior occasions within a one year period prior to the instant default and in connection with each such prior default :Sellor [sic] has given the Buyer a notice of the right to cure the default in a manner that is in compliance with this provision, no notice shall be given.

Despite this law firm's substantial involvement in the area of manufactured housing finance, we have never encountered such an interpretation of § 590.4(h) nor a credit contract that would be in compliance with such a requirement.

An interpretation that would require a contractual clause that specifically reflects the provisions of § 590.4(h) to be included in the contract would result in an ex post facto requirement that would instantly expose the manufactured housing finance industry to overwhelming liability. Moreover, this burden to the industry would not be counter-balanced by a corresponding benefit to consumers. As noted above, the inclusion of a contractual clause

accurately reflecting the regulatory provisions and exceptions would be so convoluted and vague that it would have little meaning to consumers[2]. Nor would the creditor be able to simplify the clause by leaving out the circumstances under which the exceptions to the notice requirement apply, because such omissions either would make the contract vague or would subject creditors to contractual requirements broader than those set out in the regulation. If a creditor were to merely state that a 30-day notice is required, the creditor would be contractually bound to give such notice even under circumstances in which the Bank Board's regulations would otherwise permit the creditor to exercise rights upon default without giving notice.

We also note that when the Bank Board intended creditors to include other terms and conditions in the contract, it expressly set forth the requirements in its regulations. For example, 12 C.F.R. § 590.4(d), which requires that the debtor be permitted to prepay the loan at any time without penalty, expressly states that "[t]he right to prepay shall be disclosed in the loan contract . . . ." Subsection (e), regarding balloon payments, permits balloon payments if, inter alia, such payments are agreed to in writing and "the agreement sets out the amounts and due dates of each scheduled installment." The late charge provision,

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[2]To the extent this notice is intended to "disclose" to the consumer his rights upon default, the amount of detailed and conditioned information required to accurately inform the consumer of his rights would inject precisely the type of "informational overload" into the contract that Congress attempted to eliminate in Title VI of DIDMCA (the "Truth in Lending Simplification and Reform Act"). Moreover, an interpretation requiring such an explicit statement of the right to be included as an express term of the contract — when the disclosure provided following default clearly accomplishes all statutory objectives — erects a hypertechnical barrier to creditor compliance. Such complexity is all too reminiscent of the compliance burdens which the Truth in Lending Act and Regulation Z placed on creditors before Congress wisely enacted simplifying amendments to facilitate compliance, limit :cereditor [sic] liability and prevent information overload.

subsection (f), provides that "[n]o late charge may be assessed, imposed, or collected unless provided for by written contract between the creditor and the debtor." Finally, subsection (g), regarding deferral fees, states that "agreements providing for deferral of all or part of one or more installments shall be in writing, signed by the parties . . ." and then sets forth the necessary elements of that agreement.

In contrast, subsection (h), which requires the 30-day notice before repossession, foreclosure or acceleration, is noticeably silent with regard to any requirement that the right be specified in the contract. This subsection merely requires that the 30-day notice be provided before repossession, foreclosure [sic] or acceleration. We believe that the Bank Board's omission of any explicit requirement that the 30-day notice be a term of the contract, when it had explicitly required other consumer protections to be written into the contract (and in fact did so in the four preceding subsections of the regulation), clearly demonstrates that the Bank Board did not intend to impose a requirement that the borrower's right to a 30-day notice be a contractual term.

We request that the Bank Board clarify the ambiguity created by the Arkansas court and reaffirm its intent that such a contractual term is not required.

Conclusion — Based upon the foregoing analysis of all relevant sources of interpretation with regard to the 30-day notice requirement, we believe that:

(1) the language of the regulation and the statute do not indicate that a 30-day notice of default and right to cure default must be a term of a consumer's credit contract for the purchase of a manufactured home in order for the transaction to qualify for federal preemption;

(2) no greater rights or benefits would inure to the benefit to [sic] consumers if such a provision were required in the contract;

(3) relying on the absence of an express requirement that such a notice be contained in the contract, the manufactured housing credit industry has consummated thousands of contracts relying upon the § 501 preemption without such a notice; and

(4) an interpretation to the effect that the statute or regulation implicitly requires such a provision in manufactured housing credit contracts would jeopardize the legality and enforceability of thousands of existing contracts, and would impose great financial liability upon the manufactured housing credit industry.

Accordingly, we request that the Bank Board issue an interpretation holding that such a contractual term is not required to qualify for the preemption pursuant to § 501 of the Act, so long as an appropriate notice (if required) is issued by the creditor to the Buyer at least 30-days prior to repossession, foreclosure or acceleration upon default and all other consumer safeguards prescribed by the regulation are provided.

We trust that the above material fully presents the issue faced by our client. If we can be of any further assistance in this regard, please do not hesitate to call.

Sincerely,

/s/ D. Edwin Schmelzer

D. Edwin Schmelzer

DES/am/4033B/805

cc: Windy Samuel, Esq.

HAND DELIVERED

APPENDIX F

NIXON, YOW, WALLER & CAPERS

May 11, 1983

Mr. Thomas B. Vartanian
General Counsel
Federal Home Loan Bank Board
1700 G Street, N. W.
Washington, D. C. 20552

Dear Mr. Vartanian:

I am currently involved in some litigation representing Plaintiffs in lawsuits pending in the United States District Court for the Southern District of Georgia against mobile home and manufactured home lenders. The issue is whether or not the Georgia Motor Vehicle Sales Finance Act controls the finance charges that could be charged on these transactions or whether or not this state law has been preempted by the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub.L. 96-221, § 501, 94 Stat. 161-63 (1980). My reading of the Act in the Consumer Protection Regulations promulgated by the Federal Home Loan Bank Board, 12 C.F.R. § 590.4 indicates that, in part, the issue will be controlled by whether or not the lender elected to grant these consumers those consumer protection rights that must be granted if a certain transaction is to fall under federal law and if the state laws governing finance charges are to be preempted. I have read your opinion of October 28, 1982, which responded to a letter of October 7th, requesting an interpretation of the Board regulation § 590.4(h). I would appreciate it very much if you would kindly send me any other opinions of the Federal Home Loan Bank Board that have been issued concerning the Depository Institutions Deregulation and Monetary Control Act of 1980, or the regulations set forth in 12 C.F.R. § 590.4.

Due to the fact that lawsuits are currently pending, I believe that the Federal Home Loan Bank Board will be asked to give certain opinions concerning the meaning of certain provisions

of the consumer protection regulation promulgated by the Board and set forth in 12 C.F.R. § 590.4. Due to that fact, and due to the fact that certain opinions issued by the Federal Home Loan Bank Board may be used by the Defendants in defending the litigation, I would appreciate it very much if you would kindly advise me of any request for an interpretation of the consumer protection regulation set forth in 12 C.F.R. § 590.4 which are forthcoming.

Very truly yours,

/s/ John B. Long

John B. Long

JBL/bjb

cc: Mr. David E. Hudson
Mr. Thomas W. Tucker
Mr. Jay M. Sawilowsky, Jr.
with/enclosures

APPENDIX G

WITKOWSKI, WEINER, McCAFFREY and BRODSKY, P.C.

August 11, 1983

HAND DELIVERED

Ralph W. Christy, Esq.
Acting General Counsel
Federal Home Loan Bank Board
1700 G Street, N.W.
Washington, D.C. 20552

Re: Manufactured Housing Consumer Protection Provisions—*Prepayment Disclosure (590.4(d))*

Dear Mr. Christy:

We are writing on behalf of Citicorp Acceptance Company, Inc. ("CAC"), to request that the Federal Home Loan Bank Board (the "FHLBB" or "Bank Board") address itself to an issue which has arisen in litigation and which is described in the paragraphs below.[1] We further request that the Bank Board: (1) publish its response in a formal interpretation pursuant to 12 C.F.R. § 590.5 under the authority vested in it by Section 501 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA" or "the Act") and (2) file an amicus brief with the United States District Court for the Southern District of Georgia.

Statement of Facts—The litigation arose in the state of Georgia out of the following facts and circumstances. Plaintiffs

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[1]As you may know, we met with Patrick Doyle, Peter Barnett and Harvey Simon on May 3, 1982 [sic (1983)], to discuss a similarly technical issue under § 590.4 that had arisen in connection with this litigation. At that time, we represented three defendants, each faced with class action liability. Since then, two of these defendants have been dismissed from this litigation by the District Court, and appeal has been taken by plaintiffs' counsel. Plaintiffs motion for summary judgment has been granted against the third defendant, CAC, and an order to enter a judgment is pending before the court.

purchased a mobile home under a retail installment sales contract that was assigned to the defendant, our client. The credit sale was secured by the mobile home and the rate upon which the finance charge was calculated under the contract was in excess of the rate permitted under the Georgia Motor Vehicle Sales Finance Act ("GMVSFA").

The defendant had carefully structured the transaction to comply with the Bank Board's consumer protection regulations regarding manufactured home loans and credit sales (12 C.F.R. § 590.4), and in fact submitted detailed comments to the Bank Board in connection with these regulations. Under DIDMCA, compliance with the Bank Board regulations is a prerequisite for the exemption of these credit transactions from state usury laws under § 501(c) of the Act.

In late March, 1983, plaintiffs brought an action for themselves and all other persons similarly situated against Citicorp Homeowners, Inc. and its successor in interest on these contracts, CAC, alleging usury violations under GMVSFA. Following various discovery and procedural steps, the United States District Court for the Southern District of Georgia, Augusta Division, Judge Dudley H. Bowen, Jr., heard oral argument of counsel on procedural issues. After reviewing the motions, the pleadings, the arguments of counsel for the parties at a hearing on July 25, 1983, affidavits of the parties, and statements of fact, the court granted summary judgment in favor of plaintiffs and against our client, and requested that counsel submit an order so that judgment could be entered. The judge has yet to issue any final order, but may take such action as early as Monday, August 15, 1983.

A primary point of contention in the litigation involved the disclosure requirements of § 590.4(d), which provides as follows:

> (d) *Prepayment penalties.* A debtor may prepay in full or in part the unpaid balance of the loan at any time without penalty. The right to prepay shall be disclosed

> in the loan contract in type larger than that used *for the body of the document.* (Emphasis added).

At the top of the contract involved is [sic] this dispute, a copy of which is attached, defendant had printed in boldface type a statement that "Buyer May Prepay the Unpaid Balance on this Contract in Whole or in Part at Any Time Without Penalty." Moreover, in the body of the contract defendant used virtually identical language in regular size type following a boldface heading "Prepayment Rebate" to establish the contractual rights of the parties.

Although none of the parties have seen the written rationale of the judge, it is our understanding that at the July 25, 1983, hearing the judge determined that plaintiffs should prevail on the merits.

It is noteworthy that the issue before the court is not whether the right to prepay had been disclosed, but whether it had been disclosed "in type larger than that used for the body of the document." In deciding against the defendant, the judge apparently concluded: that the federally required disclosures "FINANCE CHARGE" and "ANNUAL PERCENTAGE RATE" were larger than the prepayment disclosure; that other printed words, such as captions, were clearly larger than the prepayment disclosure; and that the "Holder in Due Course" disclosure required by the Federal Trade Commission was in a larger type font. Therefore, considering the contract in its entirety, the court concluded that the prepayment disclosure was not printed in type larger "than that used for the body of the document."

Issue—Our question to the Bank Board flows from this ruling: in order for a transaction to qualify for federal preemption under § 501(c) of DIDMCA, must the prepayment disclosure be in a type size larger than all other information on the consumer credit contract, including captions, creditor identification, and state and federally prescribed disclosures that must also be conspicuously disclosed, or must the disclosure be

larger only than the general body type used to print the general terms and conditions of the contract?

ARGUMENT

Introduction—It is our belief that the latter standard is the appropriate interpretation of § 590.4(d). We submit that there is nothing in the Conference Report to § 501 of the Act, the Act itself, or the Bank Board's Regulations or subsequent Interpretations that would require that the prepayment disclosure be in larger type than all other information contained on the form. We assert, rather, that the purpose for requiring the prepayment right to be disclosed in a type size larger than the body of the document was merely to assure that the disclosure of this right was not buried in the fine print of the contract. The impending ruling issued by the Southern District of Georgia needlessly jeopardizes enforceability of thousands of existing contracts and undermines the safety and soundness of creditors in the manufactured housing finance industry, including banks, savings and loan associations, mortgage bankers and similar entities that purchase such contracts.

We also submit that the consumers in this case (as well as all similarly situated individuals) neither suffered any harm nor were deprived of any benefit by not having the right disclosed in "giant" type. The right to prepayment without penalty was the first piece of substantive information presented on the form, and it was deliberately given such a prominent position in a good faith effort to comply with the regulatory provisions of § 590.4. The text of this disclosure was printed in boldface type and was accentuated by the use of uppercase letters for all significant words. Moreover, the prepayment right was set forth in at least one other portion of the contract in language consistent with the text of the disclosure.

In light of these compliance precautions and special efforts to assure that borrower's would be apprised of their prepayment rights, it is clear that the consumer's rights have not been impaired, nor is there any reasonable argument that any great-

er benefit would have flowed to the borrowers if the disclosure had been printed in larger type. Therefore, based on a hypertechnical and overly broad construction of the regulatory requirement, the impending decision works an unfair penalty upon the defendant without any commensurate benefit to the plaintiff and without furthering any societal interests.

Such a result would convert § 501 into a universal option to bring lawsuits wholly unrelated to the purpose of the disclosures involved. As in this case, the allegations would involve nothing more than hypertechnical violations of matters that do not really bear on consumer protection and merely impose a penalty on creditors unable to chart the shifting shoals created by the constant flow of court determinations. This inappropriate use of the Act offends public policy and results in an increased cost of credit that must be borne by all borrowers.

Text of Section 501—The text of § 501 states that the exemption from state usury laws for credit transactions secured by a first lien on a manufactured home will not apply "unless the terms and conditions relating to such loan, mortgage, credit sale, or advance comply with the consumer protection provisions specified in regulations described by the Federal Home Loan Bank Board." (§ 501(c) of the Act). That section further states that the Bank Board's regulations shall contain specifically enumerated consumer protection provisions, including the right to prepay at any time without penalty.

Please note the statutory language is silent as to disclosure of these consumer protection provisions as well as any type size requirements relating to any such disclosure.

Conference Report—In the Manufactured Home Financing section of the Joint Explanatory Statement of the Committee of Conference (H.R. Rep. No. 96-842, at 79 (1980)), the conferees made no mention of the need to disclose prepayment rights, let alone requiring conspicuousness of any disclosures. The Conference Report provides that the federally prescribed consumer safeguards should not preempt similar state laws that are more protective of the consumer. However, we note that there is no issue under Georgia law regarding this requirement in the litigation.

Bank Board Regulations—As finally adopted, The FHLBB's consumer protection regulations for federally related loans, mortgages, credit sales and advances secured by first liens on residential manufactured homes are set forth in 12 C.F.R. § 590.4. Subparagraph (d) of that section requires that the disclosure of the right to prepay without penalty "be disclosed in the loan contract in type larger than that used for the body of the document."

In its proposed implementing regulations, the Bank Board had proposed that the right to prepay be "conspicuously disclosed in the loan contract." See 45 Fed. Reg. 31124 (May 12, 1980). In the regulatory preamble, the Bank Board merely noted that a lender could not assess penalties in the event a borrower choose [sic] to prepay in full the unpaid balance of a mobile home loan, and that the Board believed such penalties would deter borrowers from refinancing or selling mobile homes. The initial regulatory preamble to the proposal did not elaborate as to what was meant by its "conspicuous" disclosure requirement.

During the ensuing public comment period, several creditors (including the defendant) raised issues as to the "conspicuous" disclosure requirement. The Bank Board took note of these comments, and in the preamble to its final regulations stated that:

> Respondents also took issue with the requirement that the right to prepay without penalty be "conspicuously" printed in the loan document. It was reasoned that, since the word "conspicuous" has been litigated in connection with a requirement of Federal Reserve Regulation Z (12 C.F.R. 226.8(b)), the Board's additional requirement might give rise to questions whether the print must be as large as, same as, or larger than that required by Regulation Z. 45 *Fed. Reg.* 43684 (June 30, 1980).

The prescience of this statement is remarkable, because the very result the Bank Board sought to avoid became the trivial exercise in which the defendants in this case, as well as the court, were forced to indulge. Ironically, the avoidance of such

hypertechnical litigation, which we perceive to have been in the forefront of the Board's decision in this matter and which was the theme in Title VI of DIDMCA,[2] threatens to reingulf the credit industry and the judicial system, if the court's decision in this case is made without guidance from the regulatory agency that implemented the statutory requirement.

We submit that the Board had no intention of promulgating a requirement that the print had to be as large as, the same size as, or larger than other disclosures that are required to be more conspicuous under state or federal law. Therefore, there was no intent that the prepayment disclosure be in the largest type used anywhere on the contract.

Conspicuousness and type-size requirements abound under state and federal law. For example:

- The Federal Truth in Lending Act requires that two disclosures, the "FINANCE CHARGE" and "ANNUAL PERCENTAGE RATE," be disclosed more conspicuously than other information in the disclosure statement;

- Certain federally prescribed disclosures, such as the Federal Trade Commission's "Holder in Due Course" notice, must be printed in at least ten-point bold face type in all capital letters;

- Certain state-prescribed disclosures (such as those frequently involving property damage insurance, liability insurance, instructions not to sign a contract if blank spaces are contained in it and similar provisions) require specific type fonts and sizes ranging from 8-18 point;

- Creditors frequently use art work on the form, or will preprint, type or write by hand numbers and symbols (such as dollar or percentage signs) and use large type

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[2]Title VI of DIDMCA contained the "Truth in Lending Simplification and Reform Act."

to identify themselves (typically displayed at the top of forms).

This competition for more conspicuous disclosure places creditors in a "Catch-22"-type dilemma. To make the prepayment disclosure larger than other federally required disclosures (such as Truth-in-Lending) or state-required disclosures (such as notices to the buyer) could result in penalties for violation of those provisions. On the other hand, to make those disclosures larger would create a usury violation under the hypertechnical and unnecessarily expansive reading given the prepayment disclosure requirement by the District Court.

The Board itself indicated that it wanted to avoid such a judicial morass. The regulatory preamble to the Board's final regulation concluded:

> As for the requirement that the right to prepay be "conspicuously" printed on the loan contract, the Board agrees that this may be potentially troublesome. Therefore, the requirement is changed so that type-size larger than that used for the body of the loan document may be used to call attention to this provision.

We respectfully request that the Bank Board clarify the ambiguity created by the Southern District of Georgia and reaffirm its intent that the type-size required for this disclosure need be larger only than the general body type used to print the general terms and conditions of the contract.

Conclusion—Based on the foregoing analysis and the relevant sources of interpretation with regard to the prepayment disclosure, we submit that:

(1) Any method of disclosure using type larger than the body of the contract is sufficient to satisfy this regulatory requirement;

(2) That the words "body of the document" mean the text of the contractual provisions and terms and conditions set forth therein, exclusive of information such as headings, captions, typed or written information, symbols, artwork, state and federally required dis-

closures and notices, and the identity of the creditor or logo associated with it.

(3) That the purpose of the regulatory requirement is to draw attention to the statutorily and regulatorily protected rights. To the extent that the lender draws attention to those rights through larger type (either by size or by using bold-face upper and lower case letters in lieu of standard body type in the contract), that the conspicuousness requirement of § 590.4(d) has been met.

(4) That there is no requirement that the disclosure be in the largest type size used on the form, as long as it is larger than the type used in the body of the contract except for headings and related information highlighted earlier.

Accordingly, to resolve this problem and clarify the meaning of this requirement, we request that the Bank Board: (1) issue an interpretation and (2) file an amicus brief with the United States District Court for the Southern District of Georgia.

We apologize for the delay in coming to the Bank Board. The intent of the Court became clear only a short time ago, and our client has been attempting to determine the basis of the judge's determination. However, because of the exigencies involved, we would be most appreciative of a prompt response.

We trust the above material fully presents the issue faced by our client. If we can be of further assistance in this regard, please do not hesitate to call.

Sincerely,

/s/ D. Edwin Schmelzer

D. Edwin Schmelzer

DES/sg/8336B-242

cc: Patrick A. Doyle, Esq.
Wendy A. Samuels, Esq.
Harvey Simon, Esq.
Peter Barnett, Esq.

Attachment

APPENDIX H

WITKOWSKI, WEINER, McCAFFREY and BRODSKY, P.C.

August 12, 1983

HAND DELIVERED

John E. Gunther, Esq.
Deputy Director, Litigation Division
Office of General Counsel
Federal Home Loan Bank Board
1700 G Street, NW
Washington, D.C. 20552

Re: Usury Preemption Class Action in Georgia

Dear Mr. Gunther:

I am writing to follow up on our phone conversation of this morning in which you requested further explanation and support for a point made in our letter of May 11, 1983 to the Board's Acting General Counsel. Specifically, we had indicated in that letter that the pending ruling of Judge Bowen on the prominence of the "prepayment without penalty" disclosure required by 12 C.F.R. § 590.4(d) would place creditors in a "Catch-22" type position, in that if they made the prepayment without penalty disclosure larger than any other type in their contract documents they would violate other federal and state law disclosure requirements.

With respect to other federally required disclosures, we submit the following:

Prior to October 1, 1982 (the date on which the Truth in Lending Simplification and Reform Act amendments became effective and the relevant period with regard to the execution of the contracts at issue), the Truth in Lending Act as implemented by Regulation Z required the terms Annual Percentage Rate and Finance Charge to be printed in a type more conspicuous than other terminology required to be disclosed by the Regulation. See: the 1981 version of 12 C.F.R. § 226.6(a).

Under the same version of Regulation Z, creditors were required to disclose if a penalty would be imposed for prepayment of the obligation. See: the 1981 version of 12 C.F.R. 226.8(b)(6). Thus prepayment penalty information was a required Regulation Z disclosure which, in accordance with the general provisions of the Regulation cited above, was required to be disclosed in a less conspicuous manner than the Annual Percentage Rate or Finance Charge. Printing the prepayment penalty information in such larger type constituted an automatic violation of Truth In Lending and under the terms of 15 U.S.C. 1640(a) at that time subjected creditors to statutory damages of up to $500,000 or one percent of their net worth (whichever is less) plus the recoupment of plaintiff's court costs and attorney's fees in connection with any successful action.

It was this concern that prompted at least four creditor commenters on the Bank Board's proposed regulations implementing section 501(c) to urge the Board to drop its earlier "conspicuous" disclosure requirement. (Those comments are included in the materials that we submitted to you on August 11, 1983.) The same issue likewise prompted Citicorp's decision on the type size of its prepayment without penalty disclosure; you will note that the type for the prepayment disclosure, while larger than the body of the contract text, is less prominent than that used to disclose the Annual Percentage Rate and Finance Charge.

With regard to similarly conflicting state required disclosure requirements, we are continuing our research and will provide you with the results as soon as they are available. However, I believe that any state disclosure provision merely requiring its own type size to be as prominent as any other disclosure given would clearly violate Judge Bowen's pending interpretation of § 590.4(d).

We trust that this is responsive to your request. Should you have further questions or need copies of now-dated Regulation Z provisions, don't hesitate to call. Again, we thank you for your prompt and courteous attention to these issues.

Sincerely,

/s/ D. Edwin Schmelzer

D. Edwin Schmelzer

DES/mkp
8369B/242

APPENDIX I

FEDERAL HOME LOAN BANK BOARD

December 20, 1983

John B. Long, Esq.
Nixon, Yow, Waller & Capers
1500 Georgia Railroad Bank Building
Augusta, GA 30910-2599

Dear Mr. Long:

This is response to your letter concerning the status of a letter written by Thomas P. Vartanian, former General Counsel of the Federal Home Loan Bank Board, interpreting 12 C.F.R. § 590.4(h).

The letter in question, dated October 28, 1982, which contained an interpretation of § 590.4(h) (12 C.F.R. § 590.4(h) (1982)), was an opinion of the General Counsel issued pursuant to his authority as the Chief Legal Officer of the Board. See 12 C.F.R. 500.17. The Board has not issued a specific delegation of authority to the General Counsel to issue interpretations with regard to § 501(f) of the Depository Institutions Deregulation and Monetary Control Act of 1980, Public Law 96-221.

Please let me know if I may be of further assistance.

Sincerely,

/s/ Wendy B. Samuel

Wendy B. Samuel
Deputy Director
Policy & Projects Division

APPENDIX J

FEDERAL HOME LOAN BANK BOARD — MEMO — Office of General Counsel Inter-Office Communication

From: Steven A. Rosenberg (/s/ SAR) Date: March 12, 1984

To: Denise Field, James Lantelme Subject: Usury Preemption under DIDMCA § 501

This morning Ilsa Bush and I met with Rick Perry and representatives of various companies engaged in the business of making loans secured by first liens on residential manufactured homes to discuss matters relating to federal preemption of state usury limits pursuant to 12 C.F.R. § 590.4 (manufactured homes), which was promulgated by the Board pursuant to § 501 of the Depository Institutions Deregulation and Monetary Control Act of 1980.

During the meeting, the lenders made two requests of this Office. First, they asked that the Board publish a formal interpretation, consistent with two outstanding unpublished OCC opinions, concerning (i) disclosure of pre-payment rights and (ii) disclosure of consumer's right to cure. Secondly, they asked that the Board amend § 590.4 to provide a rule along the following lines: "State usury law is preempted notwithstanding a lender's failure to comply with the disclosure requirements of this subsection; provided that the disclosures made by the lender substantially comply with the disclosure requirements."

The lenders informed us that there has been much litigation about this subject, and that your division has submitted an amicus brief in connection with ongoing litigation in the 11th Circuit Court of Appeals. Accordingly, I would appreciate your advising me about the Litigation Division's role in that litigation and other related litigation, if any.

I also would appreciate receiving your views about the two requests made by the lenders.

APPENDIX K

FEDERAL HOME LOAN BANK BOARD — MEMO — Office of General Counsel Inter-Office Communication

From: Steven A. Rosenberg Attorney (/s/ SAR)

Date: March 23, 1984

To: C. Thomas Long Deputy General Counsel

Subject: *Rick Perry Meeting* Usury Preemption—Mobile Home Lending

This concerns our proposed meeting with attorney Rick Perry that is scheduled to be conducted on Wednesday, April 4, 1984, concerning federal preemption of state usury law with respect to mobile home financing, as provided pursuant to section 501 of the Depository Institutions Deregulation and Monetary Control Act of 1980, 12 U.S.C. § 1735f-7 note (1982), and the Board's regulations promulgated thereunder, 12 C.F.R. Part 590 (1983).

As indicated in my memorandum of March 12, 1984, Ilsa Bush and I met with Rick Perry and representatives of companies engaged in the business of financing consumer purchases of mobile homes. Please find attached a copy of the aforementioned memorandum that explains that the creditors are defendants in litigation wherein the plaintiffs have asserted that the creditors are not entitled to the benefits of the federal usury preemption law, because the creditors have failed to satisfy the conditions to the use of the "safe harbor," *i.e.*, the consumer protection disclosure requirements. The Board has filed an amicus brief in those cases.

Today, I telephoned Rick and asked him why he asked for another meeting (and why he bypassed Ilsa and me). He informed me that the 11th Circuit ruled against the creditors, and would like to get the Board to intervene in the litigation for the purposes of filing a petition for certiorari with the United States Supreme Court. I asked him to provide me with a copy of the decisions and he has done so.

APPENDIX L

FEDERAL HOME LOAN BANK BOARD — MEMO — Office of General Counsel Inter-Office Communication

From: Steven A. Rosenberg (/s/ SAR) Date: March 28, 1984

To: Ilsa K. Bush Subject: *USURY PREEMPTION* Mobile Home Matter —Citicorp, et al

Yesterday, Tom Long, Jim Lantelme, and I met with attorneys Rick Perry and Aaron Peck and representatives of Citicorp, GE Credit, and Barclays, hereafter collectively referred to as the "Lenders." The meeting concerned the recent decisions of the 11th Circuit Court of Appeals regarding federal preemption of state usury laws with respect to mobile home financing. In those decisions the court agreed with the position asserted by the Bank Board that 12 C.F.R. § 590.4 does not require a lender to disclose the borrower's "right to cure" in the promissory note. The court found that, notwithstanding the lender's technical compliance with the Bank Board's regulations, the lender was not entitled to the preemption "safe harbor," because the court found that a clause in the lender's promissory note conflicts with the spirit of the consumer protection provisions of § 501 of DIDMCA and the regulations promulgated thereunder. The Lenders have requested this Agency to file an *amicus* brief in conjunction with the Lender's petition for reconsideration *en banc*.

Tom informed the Lenders that we would consider the request on the condition that they first provide us with a written request setting forth the reasons why we should continue to participate in the litigation.

APPENDIX M

April 2, 1984

C. Thomas Long
Deputy General Counsel
Federal Home Loan Bank Board
1700 "G" Street, N.W.
Washington, DC 20552

Re: Arthur Quiller, et ux., et al. vs. Barclays-American/Credit, Inc., 11th Cir. No. 83-8455, and

Jack Grant, et ux., et al. vs. General Electric Credit Corporation, 11th Cir. No. 83-8456

Dear Mr. Long:

BarclaysAmerican/Financial, Inc., successor to Barclays-American/Credit, Inc. ("Barclays") and General Electric Credit Corporation ("GECC") request the Federal Home Loan Bank Board ("the Bank Board") to prepare and file as *amicus curiae* a memorandum in support of their petitions for rehearing and suggestions for rehearing en banc in the above-referenced appeals. Decisions have been rendered in these appeals which are manifestly erroneous and, if allowed to stand, will have grave and potentially disastrous consequences for the manufactured housing industry, institutions which have provided financing for manufactured housing, the Federal Deposit Insurance Corporation ("the FDIC") and Federal Savings and Loan Insurance Corporation ("FSLIC"), and the public at large.

1. The Bank Board Has An Interest In Promoting Financial Stability In The Financial Community In General And The FSLIC In Particular.

There has rarely been a judicial decision which has the potential to wreak financial havoc of the order of magnitude of that which will be wrought by the *Quiller* and *Grant* cases.

Approximately twenty *billion* dollars of manufactured housing credit has been extended since the enactment of § 501 of DIDMCA. Approximately eight *billion* dollars has been extended in reliance on federal preemption of state usury laws. If the majority opinions in *Grant* and *Quiller* establish the law, a great many of the § 501 credit secured by manufactured housing could be subject to the debtor's attack that the contract is usurious under the particular state's law. The effect of the decisions is to place at risk up to eight billion dollars of credit extended.[1] Approximately 50% of this credit is held by institutions (or subsidiaries or affiliates of institutions) which are insured by the FDIC and another 25%, or two billion dollars, is held by institutions insured by the FSLIC.[2]

The estimated regulatory net worth of FSLIC institutions heavily engaged in the extension of § 501 manufactured housing credit may range between two and ten billion dollars.[3] Thus, if approximately two billion dollars in manufactured housing credit is held by those institutions, application of the penalties called for by state usury laws could be catastrophic and undermine the viability of a number of FSLIC insured institutions. It should be noted that even in the Truth-in-Lending area there were statutory limitations on the creditor's liability. Here, there are no such limitations or safeguards for the lending institution.

2. The Bank Board Has An Interest In Promoting The Legislative Purpose of § 501

The threat of huge and crippling losses that these decisions present will, in and of itself, reduce the availability of credit.

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[1]Total credit extended is based upon the Monthly Survey of the Federal Reserve Board. Industry experience is that federal preemption accounts for 40% of total credit extended since 1980.

[2]Publication G-19, the Federal Reserve Statistical Released dated March, 1984.

[3]The estimate is based upon the fact that according to the Semi Annual Report of the Home Loan Bank Board dated June 30, 1983, approximately 32% of all associations hold loans secured by liens on manufactured housing.

Additionally, the doubt that the decisions engender among lenders as to whether *any* credit agreement may withstand judicial scrutiny compels a re-examination of a willingness to continue to finance manufactured housing. It is likely that many institutions will simply withdraw from § 501 financing rather than assume the tremendous risks involved. This is directly contrary to and frustrates the purpose underlying § 501 which was to *increase* the availability of housing credit and to permit that credit to be more uniformly available throughout the nation without regard to state usury laws. As Judge Roney observed in his dissent, this was "a carefully conceived financing program established to meet the needs of both parties in a time of rising cost of money." Since 80% of all homes sold for under $50,000 are manufactured homes, first time homebuyers and low to middle income families are especially affected by the chilling effect that these decisions will have on the availability of credit.

3. The Bank Board Has An Interest In Promoting Administrative Economy.

Should the decisions stand, further litigation against § 501 lenders, including FSLIC insured institutions, is inevitable. In order to ensure that affordable housing continues to be available to people of limited means and to protect the fiscal integrity of the FSLIC, the Bank Board would be forced into a situation comparable to that experienced by the Federal Reserve Board under Truth in Lending. In the early 1970's, unrealistic and hypertechnical court decisions, which went far beyond the views of the agency charged with implementing the statute and regulations, strained common sense to award recoveries to debtors under the guise of promoting consumer interests. These decisions overwhelmed the FRB staff in responding to a flood of creditor demands for assistance in the form of staff opinion letters and interpretations. An inescapable result of the *Quiller* and *Grant* decisions will be an avalanche of requests to the Bank Board for guidance from creditors attempting to obtain assurance that their documentation meets the requirements of § 501. In addition, the Bank Board

may expect to be embroiled in numerous legal proceedings throughout the United States, with the substantial burden that such involvement would entail. The Truth in Lending experience acts as an object historical lesson.

4. The Bank Board Has An Interest In Avoiding Erroneous Judicial Interpretations Or Applications Of Its Own Regulations.

The *Quiller* and *Grant* decisions set a dangerous precedent in that, in violation of the clear mandate of the U.S. Supreme Court in *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 554 (1980) the court fails to give "dispositive" effect to a rational interpretation by the Bank Board *of its own regulation.*[4]

As pointed out by the Bank Board in its *amicus* brief (adopting a General Counsel opinion letter):

> "the requirements of section 590.4(h) only refer to the *act* of giving notice . . . In light of the enormous potential liabilities that would result from loss of the federal usury preemption, the Board believes that the only requirements that a lender under section 590.4(h) must reasonably be expected to be aware of and follow are those explicitly set forth in the regulation or the Act."

The Bank Board requested *affirmance* of the District Court decision for the reasons stated in its brief. But the Court of Appeals decided that even if the contracts met the disclosure requirements of the regulations, the actual practices of cred-

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[4]In Milhollin the Supreme Court held:

> Unless demonstrably irrational, Federal Reserve Board staff opinions construing the Act or Regulation should be dispositive. . .
>
> * * *
>
> Thus, while not abdicating their ultimate judicial responsibility to determine the law [citations omitted], judges ought to refrain from substituting their own interstitial lawmaking for that of the Federal Reserve, so long as the latter's lawmaking is not irrational. 44 U.S. at 565, 568.

itors were consistent with the regulations and the alleged ambiguities concerned areas where no disclosure was required, federal preemption was not available. The Court condeded [sic] that no contractual provision for disclosure of the right to a 30 day cure notice is required and that creditors can use contracts that do not expressly grant the debtor a right to the 30 day notice. This is certainly correct and in this regard the panel *ostensibly* adopts the Bank Board position as stated in its *amicus* brief. But the Court, while paying lip service to the Bank Board, engages in exactly the kind of "interstitial law-making" prohibited by *Milhollin* when it holds that, although no mention of the 30 day notice need be made in the contract, if there is any such mention, that mention must meet certain vague standards of completeness, clarity and accuracy. These standards are apparently to be developed in the crucible of high stakes litigation. It is completely unrealistic for the Court to suggest that creditors can avoid any possible misunderstandings by omitting contractual recitals about creditor remedies following default. Since certain creditor remedies do not exist unless provided for in the contract (e.g., acceleration) and since state laws frequently require contractual recitals of the rights and remedies of the parties, *creditors* must deal with these topics in their contracts. The Bank Board understood this, the Court apparently did not.

The Court of Appeals erred in other respects as well. For example, the Court was totally incorrect in holding that the right to notice is *absolute* when such right is clearly qualified under both § 501 and the regulations. Summaries of points to be raised by Barclays and GECC on rehearing are attached as exhibits.

5. The Bank Board Has An Interest In Encouraging Confidence In And Reliance Upon Its Regulations.

This is a case of first impression construing a statute and regulation which are of nationwide importance. The holding in these two cases that, in deciding whether contract terms comply with the Bank Board regulations, "we should examine the

contract through the eyes of the typical consumer" imposes an impossible burden on any creditor attempting to take advantage of § 501. The Court further holds that notwithstanding the absence of any requirement to include in the original contract any reference to a 30 day notice of right to cure, the contract may nonetheless be scrutinized for provisions which may be vague or potentially contradictory as to that requirement if the Court finds any such issues. These standards of contract interpretation have created a potential lawsuit on every manufactured home contract entered into in reliance on federal preemption since 1980 and put every future contract in jeopardy.

The fatal and pervasive flaw in the *Quiller* and *Grant* opinions is the vague standards of contractual interpretation expressed in these cases, under which no creditor can be assured of federal preemption of state rate limitations under § 501 regardless of satisfying regulatory requirements in practice. In the real world, under these standards of contractual interpretation, no one can ever be certain whether a contractual recital dealing with a creditor remedy might not be interpreted as an inaccurate statement of the creditor's power which disqualifies the contract from federal preemption. As Judge Roney points out in his dissenting opinion, the equitable remedy to be applied is not the denial of federal preemption, but rather to simply invalidate any conflicting clause and enjoin enforcement of it.

By measuring compliance solely on the necessity of eliminating every possible misunderstanding on the part of consumers in complete disregard of whether creditor practices satisfy the Regulations, these decisions — unless modified — will dramatically impair federal preemption under § 501(c) of DIDMCA.

For all of the above reasons, Barclays and GECC respectfully request that the Bank Board support their petitions for rehearing and suggestions for rehearing en banc by filing a motion asking for leave to file a memorandum of points and authorities, accompanied by such memorandum on or before April 9, 1984.

BarclaysAmerican/Financial, Inc., Successor to BarclaysAmerican/ Credit, Inc.

By: /s/ William B. Webb, Jr.
William B. Webb, Jr., Counsel

General Electric Credit Corporation

By: /s/ Brock J. Austin
Brock J. Austin, Counsel

GENERAL ELECTRIC CREDIT CORPORATION SUMMARY OF PROBABLE ARGUMENT ON REHEARING

I.

Whether the panel decisions' erroneous construction of a single term in the contract inequitably and unjustly results in a forfeiture by the creditor of millions of dollars in Georgia alone.

A. The panel misapplied the Federal Preemption Act and the basic rules of contract construction, producing potential industry-wide liability in millions of dollars.

B. The panel erroneously construed the default and acceleration language in the contract as not requiring notice to cure before acceleration of the debt.

C. If the clauses of the provision are ambiguous or conflicting as the panel holds, then such clauses should be reconciled to give effect to the existing law and the intent of the parties.

II.

Whether the panel decision holding that a debtor has absolute right to notice of right to cure a default is contrary to the Act and Regulations.

A. The panel's holding that the default and acceleration provision and the right of notice of cure default provision are conflicting provisions is based on the premise that the debtor has an *absolute* right to a notice of right to cure a default. This holding is incorrect and inconsistent with the Act and Regulations which clearly show that the notice is a qualified, not absolute right. If the right is not absolute, then the premise underlining the supposed conflict no longer exists.

B. The panel's decision admits that the entire notice provision is not required to be in the contract. Therefore, it follows that the notice requirement is a *course of conduct* requirement. There is no allegation that GECC exercised its right to accelerate before giving the required thirty-day notice.

III.

Whether the panel decision ignores controlling principles of contractual interpretations.

A. The panel's decision ignores controiling principles of contractual interpretation. The panel erroneously construed the contractual provision to be contrary to the law. Under any interpretation, the provision is just as susceptible to being fully consistent with the existing law as to be in conflict with the law.

B. The panel erroneously holds that the parties were not presumed to know the existing law.

C. The panel ignored the severability clause in the contract which would have given the intent of the contracting parties and saved the contract from nullifying the Federal preemption.

IV.

Whether the panel decision is contrary to the national housing policy and the public policy of the State of Georgia.

A. The panel's construction of the contract language is inconsistent with the national housing policy in that it would stifle the flow of mortgage money into the housing market. Potential investors will not advance millions of dollars to provide mortgage financing on documents which would be subject to the vague standard of "potential ambiguity" set forth in the panel's decision.

B. The panel opinion is contrary to public policy of the State of Georgia. In 1983, the Georgia Legislature passed House Bill 128 which eliminated all limits on finance charges to which parties agree in writing on any manufactured home where the cash price is above $3,000. This Act also limits the maximum liability for violations to $1,000 and precludes the filing of class actions to enforce the Georgia Act. The Grant complaint was filed four days before this Act became law.

C. The GECC contract was reviewed by the FHLBB in connection with a prior request for ruling on whether the 30-

day notice provision was required to be in the contract. The same language of this provision of the contract was reviewed by the FHLBB without a finding that the provisions were confusing or conflicting. The opinion letter of the General Counsel was cited with approval by this panel in *Quiller*. A creditor should be able to rely upon this action by the governmental regulatory authority in complying with the law.

V.

Whether the panel's decision embodies a totally unjust and inequitable remedy which is inconsistent with the national and state public policy.

A. The holding of the panel would preclude a creditor from showing that its course of conduct was clearly consistent with both the Act and the Regulations. GECC has filed a request for the Court to receive an affidavit so that the Court can understand that the present ruling of the panel would produce an unjust result based on the course of conduct of the creditor.

B. The remedy allowed by the panel's opinion is draconian and contrary to other controlling rules of contractual interpretation. If the contract provision is deemed to be ambiguous or even conflicting by the Court, then the provision itself should be considered unenforceable, but the contract not declared illegal or the preemption nullified.

C. If the Court deems the provision of the contract to suggest that the creditor may accelerate payments upon default without giving notice, then the Court can construct a remedy to enjoin the creditor from accelerating without the 30-day notice. An evidentiary hearing would clearly show that GECC complied with the Act and Regulations in every respect.

QUILLER: POINTS TO BE ARGUED IN PETITION FOR REHEARING

I. The Court's Decision Fails To Follow The Mandate Of The United States Supreme Court As Pronounced In *Ford Motor Credit Corporation v. Milhollin*, 444 U.S. 554, 100 S.Ct. 790 (1980).

A. § 590.4(h) only imposes requirements as to the actual giving of the 30-day notice.

B. The FHLBB, in its amicus curiae brief in this case, has interpreted its own regulation as regulating only "the act of giving notice," not the contents of the original contract as they relate to the 30-day notice requirement.

C. The FHLBB's interpretation of its own regulation is not "demonstrably irrational."

D. Therefore, under Milhollin, the FHLBB's interpretation should be "dispositive" of the case, and the trial court's decision should be affirmed.

II. This Case Is Especially Appropriate For *En Banc* Consideration.

A. The potential damages in Quiller, Grant and Moyer combined involve multi-millions of dollars.

B. The decision would have even greater financial repercussions as the regulation is effective nationwide and the effect of the court's decision is to subject each mobile home contract to scrutiny on a case by case basis for compliance with the court's "interstitial" requirement of accurate disclosure in the contract of the details of the buyer's right to receive the 30-day notice.

C. The decision fails to follow Milhollin.

D. The case involves a case of first impression construing a federal regulation of nationwide applicability.

E. The decision was not unanimous, and Judge Roney's dissent posited an alternate remedy which would give effect to the actual requirements of the regulation, without playing havoc among the creditors.

III. Purely As A Matter Of Contract Construction, The Quiller Contract Did In Fact Condition Its Right To Accelerate Or Repossess Upon The Giving Of The Section 590.4(h) Notice Of Right To Cure.

A. The Quiller contract specifically conditions the right to accelerate or repossess as being "subject to any notice of right to cure." Under familiar rules of contract construction, that provision would be construed to be

1. legal as opposed to illegal;
2. enforceable as opposed to unenforceable; and
3. would be construed most strongly against the drafter;
4. and therefore would be given the broadest possible effect for the protection of the nondrafting party.

B. Therefore, in any lawsuit based upon the contract itself, a court would find that the provision "subject to any notice of right to cure" entitled the debtor to the section 590.4(h) notice.

C. The court was thus incorrect in concluding that the contractual provision actually was in conflict with the requirements of the regulation.

IV. As A Matter Of Law, Even If The Proviso "Without Notice, Subject To Any Notice Of The Right To Cure" Be Construed To Allow Action Violative Of Section 590.4(h), The Mere Presence In The Contract Of That Provision Does Not In And Of Itself Violate The Regulation.

A. In accordance with the clear wording of § 590.4(h), the interpretation of that wording by the FHLBB's general counsel in his October 28, 1982, letter, and the FHLBB's adoption of that letter at page 8 of its amicus curiae on file in this case, the right to the 30-day notice did not have to be provided for in the contract between the parties, nor did that right have to be disclosed in the original contract.

B. As interpreted by the FHLBB, § 590.4(h)(1) regulates only "the act of giving notice." FHLBB amicus brief, p. 7.

C. A provision in a contract which, if enforced in accordance with its terms, would result in the violation of a federal statute, does not void the entire contract — the only sanction is that the provision itself is unenforceable and, if the provision is in fact enforced, the offending party is subject to whatever sanctions are imposed for taking such action. *Stewart v. Ford Motor Credit Company*, 685 F.2d 391, *reh. den* 694 F.2d 727 (11th Cir. 1982); *Vineberg v. Brunswick Corporation*, 391 F.2d 184 (5th Cir. 1968); *Seaboard Surety Company v. Harbison et al.*, 304 F.2d 247 (7th Cir. 1962); *Ets-Hokin & Galvan, Inc. v. Maas Transport, Inc. et al.*, 380 F.2d 258 (8th Cir. 1967). *See, Bell v. Loosier of Albany, Inc.*, 237 Ga. 585, 229 S.E.2d 374 (1976); *Porter et al v. Midland-Guardian Company*, 145 Ga. App. 262, 243 S.E.2d 595 (1978), *rev'd on other grounds*, 242 Ga. 1, 247 S.E.2d 743 (1978); *Lowe v. Termplan, Inc.*, 144 Ga. App. 671, 242 S.E.2d 268 (1978).

V. The Quillers' Complaint Was Filed Beyond The Applicable One Year Statute Of Limitations, As Clearly Appears On The Face Of The Complaint In THIS CASE.

A. The complaint was filed more than one year after the contract was executed.

B. As the Federal Preemption Act contains no statute of limitations, federal law requires that the court look to the most closely analogous state statute of limitations. *Johnson v. Railway Express Agency Inc.* 421 U.S. 454, 95 S. Ct. 1716, 44 L. Ed. 2d 295 (1975).

C. The most closely analogous state statute of limitations would be that contained in Georgia's usury statute, Ga. Code Ann. § 57-115, which prescribes a one year statute of limitations.

D. As this is a suit to enforce a penalty, the one year statute of limitations found in Ga. Code Ann. § 3-714 would also bar the Quillers' suit.

APPENDIX N

NOTE

_____, 19__ _____, _____
(City) (State)

Property Address)

1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S. $_____ (this amount is called "principal"), plus interest, to the order of the Lender. The Lender is _____ _____ I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

2. INTEREST

. . .

3. PAYMENTS

. . .

4. BORROWER'S RIGHT TO REPAY

. . .

5. LOAN CHARGES

. . .

MULTISTATE FIXED RATE NOTE—Single Family—
FNMA/FHLMC UNIFORM INSTRUMENT
Form 3200 12/83

6. BORROWER'S FAILURE TO PAY AS REQUIRED

(A) Late Charge for Overdue Payments

If the Note Holder has not received the full amount of any monthly payment by the end of _____ calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be _____% of my

overdue payment of principal and interest. I will pay this late charge promptly but only once on each late payment.

(B) Default

If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.

(C) Notice of Default

If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of principal which has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is delivered or mailed to me.

(D) No Waiver By Note Holder

Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time.

(E) Payment of Note Holder's Costs and Expenses

If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.

7. GIVING OF NOTICES

. . .

8. OBLIGATIONS OF PERSONS UNDER THIS NOTE

. . .

9. WAIVERS

. . .

10. UNIFORM SECURED NOTE

This note is a uniform instrument with limited variations in some jurisdictions. In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust or Security Deed (the "Security Instrument"), dated the same date as this Note, protects the Note Holder from possible losses which might result if I do not keep the promises which I make in this Note. That Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note. Some of those conditions are described as follows:

> Transfer of the Property or a Beneficial Interest in Borrower. If all or any part of the Property or any interest in it is sold or transferred (or if a beneficial interest in Borrower is sold or transferred and Borrower is not a natural person) without Lender's prior written consent, Lender may, at its option, require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if exercise is prohibited by federal law as of the date of this Security Instrument.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is delivered or mailed within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED

_____ (Seal)
Borrower

_____ (Seal)
Borrower

_____ (Seal)
Borrower

[Sign Original Only]